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Readings in Parallel Judiciaries

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To Cynthia

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The Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] 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.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first

Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall choose their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every 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, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and Post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States

respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

[18] To 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.

Section 9. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] 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 it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors

shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice-President.

[4] The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[6] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: 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.

[3] 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.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

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

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

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be 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.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

* * *

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

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.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

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

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

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.

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist

of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection

or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section 1. The 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX

The 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 sex. Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from

whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. The article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice

President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President. Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of

either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty eight hours for that purpose if not in session. If the Congress, within twenty one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

[1] **Declaration of Independence**

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

* * *

[1] 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 these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

* * *

[2] He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

* * *

Constitution of the United States
(as proposed on Sept. 17, 1791, and as subsequently ratified)

* * *

Article III

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

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

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be 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.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

* * *

James Madison, Federalist No. 51
February 8, 1788

To the People of the State of New-York.

[1] TO what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all . . . exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places . . . .

* * *

[2] [Editor's new paragraph.] *Second.* It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

[3] [Editor's new paragraph.] There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.

[4] [Editor's new paragraph.] The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties.

[5] [Editor's new paragraph.] The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government . . . .

* * *

PUBLIUS.

Brutus, Fifteenth Essay
March 20, 1788

[1] I said in my last number, that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe, the courts of law are put upon the most prudent establishment, they are on a very different footing.

[2] The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union. — I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution. They consider themselves bound to decide according to the existing laws of the land, and never undertake to controul them by adjudging that they are inconsistent with the constitution — much less are they vested with the power of giving an *equitable* construction to the constitution.

[3] The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.

[4] I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible. But I say, this system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering the judges independent; which, in the British constitution, means no more than that they hold their places during good behaviour, and have fixed salaries, they have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. . . . .

* * *

[5] The only clause in the constitution which provides for the removal of the judges from office, is that which declares, that "the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors." By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors.—Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges commited the error from wicked and corrupt motives.

[6] 3d. The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority which vested the legislature with their powers, vested the judicial with theirs — both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial. — The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgement of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme — and no law, explanatory of the constitution, will be binding on them.

* * *

[7] Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature. A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and

ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm*.

Brutus.

Alexander Hamilton, Federalist No. 78
May 28, 1788

To the People of the State of New-York.

[1] WE proceed now to an examination of the judiciary department of the proposed government.

* * *

[2] Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

[3] This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power;[*] that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive . . . .

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[*]The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." — The Spirit of the Laws.

[4] The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

[5] Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

[6] There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

[7] If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

[8] Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

[9] This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

[10] But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

[11] It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

* * *

PUBLIUS.

Notes on the Declaration, Article III, Madison, Brutus, and Hamilton

1. If you were designing a judicial system from scratch, how much independence from the political system would you want the judges to have? Whose argument do you find more persuasive — Brutus' or Hamilton's? In responding to George III's abuses, did the authors of the Constitution throw the baby out with the bathwater? See Declaration ¶ [2].

2. Madison, Brutus and Hamilton were having their dispute *while* the Constitution was being considered by the states. They were addressing their concerns to "*the People of the State New-York*," as Madison and Hamilton began their essays. At this time, New York had not yet ratified the Constitution. By its own terms, the document became operative once any *nine* of the original states ratified it. See Art. VII, cl. [2] ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."). According to this language, the new polity did not *need* New York to come into being. As a practical matter, however, its ratification was crucial. Why?

3. Brutus is widely believed to have been Robert Yates, a prominent attorney in New York during the founding era. "Brutus" was a key name in Roman history. (It means "ugly.") One bearer of that name, Lucius Junius Brutus, helped overthrow the last king of Rome, Tarquinius Superbus. Another, Marcus Junius Brutus, helped assassinate Julius Caesar, inspiring Shakespeare's line "*E tu, Brute*." Yates was one of three people (along with Hamilton) whom New York sent to Philadelphia in the summer of 1787. He and the third individual, John Lansing, left the convention before it ended, concluding that it was exceeding its instructions to modify the Articles of Confederation. By the rules of the convention, this left Hamilton unable to cast New York's vote. As a consequence, Hamilton's attendance was also sporadic.

4. Brutus argues that the people can "punish" the legislature for exceeding its powers by electing different representatives. See Brutus ¶ [7]. Does Hamilton ever explain why this approach would not be feasible? Look closely at ¶ [7] of Federalist No. 78. Where do you stand on this issue? Are elections sufficient to control a legislature that exceeds its stated powers?

5. Let's unwrap Federalist 78 a little. According to Hamilton, judicial review does not presuppose the superiority of the judiciary over the elected branches. See Hamilton ¶¶ [7]-[8]. Brutus obviously disagrees. See ¶ [3]. Who's right?

6. Hamilton argues that the agent — the legislature — must be subordinate the principal — the people. Does judicial review serve that purpose? Much of the Constitution protects minorities — individuals and entities who lack clout in the majoritarian political system. (As of 1787, most of these minorities were *economic* minorities, by the way — creditors.) When a member of a political *minority* invokes judicial review, he or she actually asks the courts to *frustrate* the will of the majority. Can that be described as consistent with the will of the People? If so, how? Is Hamilton nevertheless correct, but at a level that he does not articulate?

7. As you can see, Brutus and Hamilton are having an argument over the validity of a fairly robust form of judicial review — where the legislature has no power, at least as a formal matter, to reject an interpretation of the Constitution by the judiciary. Does Madison have an opinion on this? Look closely at ¶¶ [2]-[5] of Federalist No. 51. To the extent he contemplates judicial review, he appears to oppose it. Why is that? Do you agree with him?

Mr. Justice GRIER delivered the opinion of the court.

[1] The only question which it will be necessary to notice in this case is, whether the Circuit Court had jurisdiction.

[2] Sill, the complainant below, a citizen of New York, filed his bill in the Circuit Court of the United States for Michigan, against Sheldon, claiming to recover the amount of a bond and mortgage, which had been assigned to him by Hastings, the President of the Bank of Michigan.

[3] Sheldon, in his answer, among other things, pleaded that "the bond and mortgage in controversy, having been originally given by a citizen of Michigan to another citizen of the same State, and the complainant being assignee of them, the Circuit Court had no jurisdiction."

[4] The eleventh section of the Judiciary Act, which defines the jurisdiction of the Circuit Courts, restrains them from taking "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

[5] The third article of the Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies "controversies between citizens of different States."

[6] It has been alleged, that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.

[7] It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, — either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

[8] The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

[9] Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary. [The Court then proceeded to give an example anyway.]

[10] The only remaining inquiry is, whether the complainant in this case is the assignee of a "chose in action," within the meaning of the statute . . . .

[11] The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the "assignee of a chose in action," within the letter and spirit of the act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not.

[12] The judgment of the Circuit Court must therefore be reversed, for want of jurisdiction.

Notes on Sheldon v. Sill

1. Should Congress be able to preclude inferior federal courts from hearing entire categories of cases? Does its *greater power* not to create such courts in the first place give it the *lesser power* of creating such courts but limiting their jurisdiction? Is this a fair reading of Art. III, § 1 (the "Inferior Courts Clause"), which provides that "[t]he judicial Power . . . shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish"?

As you can see, Sill relied on Art. III, § 2, cl. [2] (the "Extending Clause"), which provides that "[t]he judicial Power [of the United States] *shall extend*" (emphasis added) to certain cases, including "Controversies . . . between Citizens of different States," like *Sheldon v. Sill*. Should a natural interpretation of the Extending Clause have yielded judgment for Sill? Please consider the following two responses to this question.

First, the federal judiciary consists of the inferior federal courts that Congress creates, plus the Supreme Court, which has an appellate jurisdiction. If the Court's appellate jurisdiction reached *Sheldon v. Sill*, then the Extending Clause would be satisfied. The problem with this argument, as you will see, is that Congress has *never* given the Court appellate jurisdiction over a case in diversity that did not originate in the lower federal courts.

Alternatively, could Justice Grier have defended his decision on the ground that requiring Congress to invest *every* inferior federal court with *all* the heads of jurisdiction set forth in the Extending Clause would have been absurd? Even textualists make exceptions for absurd results.

2. As you know, a diversity case where the amount in controversy does not exceed $75,000 is not cognizable in federal district court (nor is it cognizable on appeal in the Supreme Court from state court). Such a threshold has *always* been part of the federal courts' diversity jurisdiction. See Act of Sept. 24, 1789, § 11 (authorizing federal courts to sit in diversity where the "matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars"); 28 U.S.C. § 1332. If Sill was correct in arguing that the jurisdiction of the Extending Clause is mandatory on the inferior federal courts once Congress creates such courts, those courts would then be obliged to hear a case in diversity over a $10 debt. Would that be a good use of judicial resources?

3. Was anything serious at issue in this case? Granted, Sill could not sue Sheldon in federal court. Did he have no alternative? What about a Michigan state court? Surely that court would have had jurisdiction over Sheldon's person.

4. Consider now a related issue. Could Congress *authorize* lower federal courts to hear a particular kind of case, yet *deny* those courts jurisdiction (or power) to grant a particular form of *relief*? For example, could Congress allow federal courts to hear claims between labor and management, yet forbid such courts from enjoining strikes absent certain express findings? See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938) (footnote omitted) (upholding the Norris-LaGuardia Act, which denied federal courts jurisdiction to enjoin strikes unless they complied with certain criteria) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States. The District Court made none of the required findings, save as to irreparable injury and lack of remedy at law. It follows that, in issuing the injunction, it exceeded its jurisdiction."). In a similar vein, could Congress allow federal courts to hear arguments that schools are segregated in violation of equal protection, but prohibit the equitable remedy of busing? Could it allow federal courts to preside over criminal prosecutions but forbid them to exclude evidence obtained in violation of the Fourth or Fifth Amendments? See generally Peter W. Low, John C. Jeffries, Jr. & Curtis A. Bradley, Federal Courts and the Law of Federal-State Relations 489 (9th ed. 2018).

Ex parte McCardle
74 U.S. 506 (1869)

APPEAL from the Circuit Court for the Southern District of Mississippi.

[1] [On] the 5th February, 1867, [Congress] provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in

violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and *from the judgment of the said Circuit Court to the Supreme Court of the United States*.

[2] This statute being in force, one McCardle, alleging unlawful restraint by military force, preferred a petition in the court below, for the writ of *habeas corpus*.

[3] The writ was issued, and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

[4] It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libellous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

[5] Upon the hearing, the petitioner was remanded to the military custody; but . . . appeal was allowed him to this court . . . . The appeal was taken under the above-mentioned act of February 5, 1867.

[6] A motion to dismiss this appeal was made at the last term, and . . . was denied. Subsequently[,] the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress, returned with objections by the President, and, on the 27th March, repassed by the constitutional majority, the second section of which was as follows:

> *And be it further enacted*, That so much of the act approved February 5, 1867, entitled "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed.

[7] The attention of the court was directed to this statute at the last term but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here, by his duties in the Court of Impeachment, the cause was continued under advisement. Argument was now heard upon the effect of the repealing act.

* * *

The CHIEF JUSTICE [Salmon P. Chase] delivered the opinion of the court.

[8] 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.

[9] 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."

[10] It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

[11] The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. United States*, 10 U.S. (6 Cranch) 312 (1810), particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

[12] The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts 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.

[13] The exception to appellate jurisdiction in the case before us, however, is not an inference 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.

[14] 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.

[15] 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. And this is not less clear upon authority than upon principle.

[16] Several cases were cited by the counsel for [McCardle] in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.

[17] On the other hand, the general rule, supported by the best elementary writers, is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court[,] where we have held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

[18] 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.

[19] 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.[a]

[20] The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

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[a]Editor's note: The Chief Justice here refers to a complicated and somewhat illogical alternative mechanism by which the Supreme Court had been entertaining appeals in cases involving habeas corpus since the early days of the republic. McCardle had not elected to pursue this pre-existing alternative, relying instead solely upon the avenue for appeal provided in the statute of 1867.

Notes on McCardle

1. *McCardle* is a cryptic case. Although the Court appears to allow Congress to eliminate any portion of its appellate jurisdiction, in fact Congress had eliminated only one of two ways by which McCardle could have put his case before the Court. The second, which the Court describes obliquely in ¶ [19], remained open. What then are we to make of the decision — that Congress may eliminate *any portion* of the Court's appellate jurisdiction — even a crucial one — or that Congress may make only nominal cuts in that jurisdiction — as suggested by the actual operation of the statute of March 1868?

2. What's the best construction of the Exceptions Clause? Does Congress have plenary (full) power to make exceptions to the Court's appellate jurisdiction? Isn't that a natural construction of the language of the clause?

3. On the other hand, what happens to the concept of judicial review if the primary entity being reviewed — Congress — has plenary authority to decide when the Court may review its actions on appeal? This difficult question cannot be evaded by the argument that the lower federal courts might take up the slack, because Congress has no duty to create such courts in the first place. See Art. III, § 1 ("Inferior Courts Clause"). Would judicial review then fall entirely on the *state courts*? Could the Framers have wanted that? Does Federalist 78 suggest that Hamilton saw the *state courts* as the ultimate expositors of the Constitution's meaning?

4. Where does the "Extending Clause" fit into all this? If the "judicial Power" of the United States "*shall extend*" (emphasis added) to certain cases and controversies — most especially cases "arising under" the Constitution and laws of the United States — how then could Congress simultaneously: (1) create no inferior federal courts; and (2) exclude a class of cases from the Supreme Court's appellate jurisdiction? In this regard, please keep in mind that the Court's *original jurisdiction* is tiny, reaching only cases involving foreign ministers transitorily present on our soil or cases in which a state is a party. See Art. III, § 2, cl. [2] (first sentence). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803) (holding that Congress may not add to the Court's original jurisdiction). Thus, the Court's original jurisdiction would not be competent to take up the slack were Congress to take the steps described above.

5. Many scholars — adherents of the so-called "traditional view" — have argued that state courts — not federal courts — are the "primary guarantors" of constitutional rights. See, *e.g.*, H.M. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1401 (1953). This may sound upside down, but it reflects the broad language of the Inferior Courts Clause and the Exceptions Clause. According to their argument, Congress' ability to restrict the jurisdiction of the inferior federal courts (or not to create them at all), together with its ability to restrict the appellate jurisdiction of the Supreme Court, is a *check* on judicial review — in other words, an opposing force to *Marbury*. Under this approach, the one judicial function Congress may *not* preclude are the traditional functions of *state courts*.

6. This brings up the question whether may Congress preclude *state courts* from hearing particular kinds of cases. Such power is widely recognized as valid — at least in some contexts. For example, actions for patent or copyright infringement lie only in federal court. 28 U.S.C. § 1338(a) provides as follows (emphasis added):

> The district courts [of the United States] shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. *No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.*

But conventional wisdom holds that Congress lacks power to preclude state courts from hearing federal arguments when presiding over *their own* causes of action. To give an example, imagine a federal statute that precluded any lower federal court from hearing any case in which a person asserted a right to obtain or perform an abortion under the federal Constitution. Then, imagine a state law that restricted abortion. Under the traditional view, the hypothetical federal statute could prevent a *federal* court from hearing an attack on the state law. But it would not prevent a defendant in a *state prosecution* in *state court* from raising *Roe v. Wade* and *Casey* as a defense. Now imagine a federal statute that forbade a *state court* from entertaining such a defense. Even adherents of the traditional view argue that such a statute would lie beyond Congress' powers, most particularly because the Supremacy Clause *requires* state courts to allow federal law to control where it applies. See Hart, 66 Harv. L. Rev. at 1401:

> *A.* In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.
>
> *Q.* But Congress can regulate the jurisdiction of state courts, too, in federal matters.
>
> *A.* Congress can't do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution.

7. Roughly speaking, the Court replicated *McCardle* in *Felker v. Turpin*, 518 U.S. 651 (1996). In 1996, Congress enacted legislation that, among other things, made the submission of successive petitions for a writ of habeas corpus more difficult. Specifically, the statute charged an appellate panel to review all such petitions. It also prohibited the Supreme Court from reviewing the denial of any such petition. In a unanimous opinion, the Court upheld this provision of the legislation, observing that the Court could always grant an original writ of habeas corpus to a person like Felker. This was exactly the consolation on which Chief Justice Chase relied in ¶ [19] of *McCardle*.

8. In 1872, the Court held that a state court may not hear a petition for a writ of habeas corpus against a federal officer. See *Tarble's Case*, 80 U.S. (13 Wall.) 397. Can you reconcile this decision with the traditional view described above? If Congress has plenary authority to restrict the original jurisdiction of the inferior federal courts, if the Supreme Court's own original jurisdiction is practically meaningless, and if state courts may not grant writs of habeas corpus against federal officers, then what becomes of the writ? And, what becomes of the Suspension Clause, Art. I, § 9, cl. [2], which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"? Adherents of the traditional view generally see *Tarble's Case* as incorrect, or as a form of "sub-constitutional law" that is valid if — and only if — federal courts *are* authorized to grant writs of habeas corpus against federal officers. See Richard H. Fallon, Jr., Jurisdiction-Stripping Reconsidered, 96 Va. L. Rev. 1043, 1085 (2010) ("Arguments based on *Tarble's Case* have cut no ice with adherents of the orthodox view . . . . They have dismissed *Tarble's Case* as wrongly decided, or least wrongly reasoned . . . .").

[3] **Webster v. Doe**
486 U.S. 592 (1988)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1] Section 102(c) of the National Security Act of 1947, as amended, provides that:

> [T]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .

50 U.S.C. § 403(c).

[2] In this case we decide whether, and to what extent, the termination decisions of the Director under § 102(c) are judicially reviewable.

I

[3] Respondent John Doe was first employed by the Central Intelligence Agency in 1973 as a clerk-typist. He received periodic fitness reports that consistently rated him as an excellent or outstanding employee. By 1977, respondent had been promoted to a position as a covert electronics technician.

[4] In January 1982, respondent voluntarily informed a CIA security officer that he was a homosexual. Almost immediately, the Agency placed respondent on paid administrative leave pending an investigation of his sexual orientation and conduct. On February 12 and again on February 17, respondent was extensively questioned by a polygraph officer concerning his homosexuality and possible security violations. Respondent denied having sexual relations with any foreign nationals and maintained that he had not disclosed classified information to any of his sexual partners. After these interviews, the officer told respondent that the polygraph tests indicated that he had truthfully answered all questions. The polygraph officer then prepared a five-page summary of his interviews with respondent, to which respondent was allowed to attach a two-page addendum.

[5] On April 14, 1982, a CIA security agent informed respondent that the Agency's Office of Security had determined that respondent's homosexuality posed a threat to security, but declined to explain the nature of the danger. Respondent was then asked to resign. When he refused to do so, the Office of Security recommended to the CIA Director (petitioner's predecessor) that respondent be dismissed. After reviewing respondent's records and the evaluations of his subordinates, the Director "deemed it necessary and advisable in the interests of the United States to terminate [respondent's] employment with this Agency pursuant to section 102(c) of the National Security Act . . . ." Respondent was also advised that, while the CIA would give him a positive recommendation in any future job search, if he applied for a job

requiring a security clearance the Agency would inform the prospective employer that it had concluded that respondent's homosexuality presented a security threat.

[6] Respondent then filed an action against petitioner in the United States District Court for the District of Columbia. Respondent's amended complaint asserted a variety of statutory and constitutional claims against the Director. . . . .

[7] Petitioner moved to dismiss respondent's amended complaint on the ground that § 102(c) of the National Security Act precludes judicial review of the Director's termination decisions under the provisions of the [Administrative Procedure Act] set forth in 5 U.S.C. §§ 701, 702, and 706. [Reaching only statutory claims, the] District Court denied petitioner's motion to dismiss, and granted respondent's motion for partial summary judgment. . . . .

[8] A divided panel of the Court of Appeals for the District of Columbia Circuit vacated the District Court's judgment and remanded the case for further proceedings. . . . .

[9] . . . . We granted certiorari to decide the question whether the Director's decision to discharge a CIA employee under § 102(c) of the NSA is judicially reviewable under the APA.

II

[In this part of his opinion for the Court, Chief Justice Rehnquist concluded that § 102(c) of the National Security Act, quoted above, precluded judicial review of Webster's *statutory* claims under the Administrative Procedure Act.]

III

[10] In addition to his claim that the Director failed to abide by the statutory dictates of § 102(c), respondent also alleged a number of constitutional violations in his amended complaint. Respondent charged that petitioner's termination of his employment deprived him of property and liberty interests under the Due Process Clause of the Fifth Amendment, denied him equal protection of the laws, and unjustifiably burdened his right to privacy. Respondent asserts that he is entitled, under the APA, to judicial consideration of these claimed violations.

* * *

[11] Petitioner maintains that, no matter what the nature of respondent's constitutional claims, judicial review is precluded by the language and intent of § 102(c). In petitioner's view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robison*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be

clear. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986).

[12] Our review of § 102(c) convinces us that it cannot bear the preclusive weight petitioner would have it support. As detailed above, the section does commit employment termination decisions to the Director's discretion, and precludes challenges to these decisions based upon the statutory language of § 102(c). A discharged employee thus cannot complain that his termination was not "necessary or advisable in the interests of the United States," since that assessment is the Director's alone. [The pertinent provisions of the APA,] however, remove from judicial review only those determinations specifically identified by Congress or "committed to agency discretion by law." Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court. We agree with the Court of Appeals that there must be further proceedings in the District Court on this issue.

[13] Petitioner complains that judicial review even of constitutional claims will entail extensive "rummaging around" in the Agency's affairs to the detriment of national security. But petitioner acknowledges that Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court, and the inquiry and discovery associated with those proceedings would seem to involve some of the same sort of rummaging. Furthermore, the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.

* * *

[14] The judgment of the Court of Appeals is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE O'CONNOR, concurring in part and dissenting in part.

[15] I agree that the Administrative Procedure Act (APA) does not authorize judicial review of the employment decisions referred to in § 102(c) of the National Security Act of 1947. Because § 102(c) does not provide a meaningful standard for judicial review, such decisions are

clearly "committed to agency discretion by law" within the meaning of the provision of the APA set forth in 5 U.S.C. § 701(a)(2). . . . . Accordingly, I join Parts I and II of the Court's opinion.

[16] I disagree, however, with the Court's conclusion that a constitutional claim challenging the validity of an employment decision covered by § 102(c) may nonetheless be brought in a federal district court. Whatever may be the exact scope of Congress' power to close the lower federal courts to constitutional claims in other contexts, I have no doubt about its authority to do so here. The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President, and Congress may surely provide that the inferior federal courts are not used to infringe on the President's constitutional authority. Section 102(c) plainly indicates that Congress has done exactly that, and the Court points to nothing in the structure, purpose, or legislative history of the National Security Act that would suggest a different conclusion. Accordingly, I respectfully dissent from the Court's decision to allow this lawsuit to go forward.

JUSTICE SCALIA, dissenting.

[17] I agree with the Court's apparent holding in Part II of its opinion, that the Director's decision to terminate a CIA employee is "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). But because I do not see how a decision can, either practically or legally, be both unreviewable and yet reviewable for constitutional defect, I regard Part III of the opinion as essentially undoing Part II. I therefore respectfully dissent from the judgment of the Court.

* * *

II

[18] Before taking the reader through the terrain of the Court's holding that respondent may assert constitutional claims in this suit, I would like to try to clear some of the underbrush, consisting primarily of the Court's ominous warning that "[a] 'serious constitutional question'. . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."

[19] The first response to the Court's grave doubt about the constitutionality of denying all judicial review to a "colorable constitutional claim" is that the denial of all judicial review is not at issue here, but merely the denial of review in United States district courts [as per 5 U.S.C. § 701(a)(2)]. As to that, the law is, and has long been, clear. Article III, § 2, of the Constitution

extends the judicial power to "all Cases . . . arising under this Constitution." But Article III, § 1, provides that the judicial power shall be vested "in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*" (emphasis added). We long ago held that the power not to create any lower federal courts at all includes the power to invest them with less than all of the judicial power.

> The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

[20] Thus, if there is any truth to the proposition that judicial cognizance of constitutional claims cannot be eliminated, it is, at most, that they cannot be eliminated from state courts, and from this Court's appellate jurisdiction over cases from state courts (or cases from federal courts, should there be any) involving such claims. Narrowly viewed, therefore, there is no shadow of a constitutional doubt that we are free to hold that the present suit, whether based on constitutional grounds or not, will not lie.

[21] It can fairly be argued, however, that our interpretation of § 701(a)(2) indirectly implicates the constitutional question whether state courts can be deprived of jurisdiction, because if they cannot, then interpreting § 701(a)(2) to exclude relief here would impute to Congress the peculiar intent to let state courts review Federal Government action that it is unwilling to let federal district courts review — or, alternatively, the peculiar intent to let federal district courts review, upon removal from state courts pursuant to 28 U.S.C. § 1442(a)(1), claims that it is unwilling to let federal district courts review in original actions. I turn, then, to the substance of the Court's warning that judicial review of all "colorable constitutional claims" arising out of the respondent's dismissal may well be constitutionally required. What could possibly be the basis for this fear? Surely not some general principle that *all* constitutional violations must be remediable in the courts. The very text of the Constitution refutes that principle, since it provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members," Art. I, § 5, and that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place," Art. I, § 6. Claims concerning constitutional violations committed in these contexts — for example, the rather grave constitutional claim that an election has been stolen — cannot be addressed to the courts. See, *e.g.*, *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986). Even apart from the strict text of the Constitution, we have found some constitutional claims to be beyond judicial review because they involve "political questions." See, *e.g.*, *Coleman v. Miller*, 307 U.S. 433, 443-46 (1939); *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 79-80 (1930). The doctrine of sovereign immunity — not repealed by the Constitution, but to the contrary at least partly reaffirmed as to the States by the Eleventh Amendment — is a monument

to the principle that some constitutional claims can go unheard. No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation. And finally, the doctrine of equitable discretion, which permits a court to refuse relief, even where no relief at law is available, when that would unduly impair the public interest, does not stand aside simply because the basis for the relief is a constitutional claim. In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.

[22] Perhaps, then, the Court means to appeal to a more limited principle, that although there may be areas where judicial review of a constitutional claim will be denied, the scope of those areas is fixed by the Constitution and judicial tradition, and cannot be affected by *Congress*, through the enactment of a statute such as § 102(c). That would be a rather counterintuitive principle, especially since Congress has in reality been the principal determiner of the scope of review, for constitutional claims as well as all other claims, through its waiver of the pre-existing doctrine of sovereign immunity. On the merits of the point, however: It seems to me clear that courts would not entertain, for example, an action for backpay by a dismissed Secretary of State claiming that the reason he lost his Government job was that the President did not like his religious views — surely a colorable violation of the First Amendment. I am confident we would hold that the President's choice of his Secretary of State is a "political question." But what about a similar suit by the Deputy Secretary of State? Or one of the Under Secretaries? Or an Assistant Secretary? Or the head of the European Desk? Is there really a constitutional line that falls at some immutable point between one and another of these offices at which the principle of unreviewability cuts in, and which cannot be altered by congressional prescription? I think not. I think Congress can prescribe, at least within broad limits, that for certain jobs the dismissal decision will be unreviewable — that is, will be "committed to agency discretion by law."

[24] Once it is acknowledged, as I think it must be, (1) that not all constitutional claims require a judicial remedy, and (2) that the identification of those that do not can, even if only within narrow limits, be determined by Congress, then it is clear that the "serious constitutional question" feared by the Court is an illusion. Indeed, it seems to me that if one is in a mood to worry about serious constitutional questions the one to worry about is not whether Congress can, by enacting § 102(c), give the President, through his Director of Central Intelligence, unreviewable discretion in firing the agents that he employs to gather military and foreign affairs intelligence, but rather whether Congress could constitutionally permit the courts to review all such decisions if it wanted to. We have acknowledged that the courts cannot intervene when there is "a textually demonstratable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). We have recognized "the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches."

United States v. Stanley, 483 U.S. 669, 682 (1987). We have also recognized "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). And finally, we have acknowledged that "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." *Snepp v. United States*, 444 U.S. 507, 512, n.7 (1980) (per curiam). We have thus recognized that the "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President *and exists quite apart from any explicit congressional grant*." *Department of Navy v. Egan*, 484 U.S. at 527 (emphasis added).

[25] I think it entirely beyond doubt that if Congress intended, by the APA in 5 U.S.C. § 701(a)(2), to exclude judicial review of the President's decision (through the Director of Central Intelligence) to dismiss an officer of the Central Intelligence Agency, that disposition would be constitutionally permissible.

III

[26] I turn, then, to whether that executive action is, within the meaning of § 701(a)(2), "committed to agency discretion by law." My discussion of this point can be brief, because the answer is compellingly obvious. Section 102(c) of the National Security Act of 1947 states:

> *Notwithstanding . . . the provisions of any other law*, the Director of Central Intelligence, *may, in his discretion,* terminate the employment of any officer or employee of the Agency *whenever he shall deem* such termination necessary or advisable in the interests of the United States . . . .

50 U.S.C. § 403(c) (emphasis added).

[27] Further, as the Court declares, § 102(c) is an "integral part" of the National Security Act, which throughout exhibits "extraordinary deference to the Director." Given this statutory text, and given (as discussed above) that the area to which the text pertains is one of predominant executive authority and of traditional judicial abstention, it is difficult to conceive of a statutory scheme that more clearly reflects that "commit[ment] to agency discretion by law" to which § 701(a)(2) refers.

[28] It is baffling to observe that the Court seems to agree with the foregoing assessment, holding that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion." Nevertheless, without explanation the Court reaches the conclusion that "a constitutional claim based on an individual discharge may be reviewed by the District Court." It seems to me the Court is attempting the impossible

feat of having its cake and eating it too. The opinion states that "[a] discharged employee . . . cannot complain that his termination was not 'necessary or advisable in the interests of the United States,' *since that assessment is the Director's alone*." (Emphasis added.) But two sentences later it says that "[n]othing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section." Which are we to believe? If the former, the case should be at an end. If the § 102(c) assessment is really "the Director's alone," the only conceivable basis for review of respondent's dismissal (which is what this case is about) would be that the dismissal was not *really* the result of a § 102(c) assessment by the Director. But respondent has never contended that, nor could he. Not only was his counsel formally advised, by letter of May 11, 1982, that "the Director has deemed it necessary and advisable in the interests of the United States to terminate your client's employment with this Agency pursuant to section 102(c)," but the petitioner filed with the court an affidavit by the Director, dated September 17, 1982, stating that "[a]fter careful consideration of the matter, I determined that the termination of Mr. Doe's employment was necessary and advisable in the interests of the United States and, exercising my discretion under the authority granted by section 102(c) . . . I terminated Mr. Doe's employment." Even if the basis for the Director's assessment was the respondent's homosexuality, and even if the connection between that and the interests of the United States is an irrational and hence an unconstitutional one, if that assessment is really "the Director's alone" there is nothing more to litigate about. I cannot imagine what the Court expects the "further proceedings in the District Court" which it commands, to consist of, unless perhaps an academic seminar on the relationship of homosexuality to security risk. For even were the District Court persuaded that no such relationship exists, "that assessment is the Director's alone."

[29] Since the Court's disposition contradicts its fair assurances, I must assume that the § 102(c) judgment is no longer "the Director's alone," but rather only "the Director's alone except to the extent it is colorably claimed that his judgment is unconstitutional." I turn, then, to the question of where this exception comes from. As discussed at length earlier, the Constitution assuredly does not require it. Nor does the text of the statute. True, it only gives the Director absolute discretion to dismiss "[n]otwithstanding . . . the provisions of any other *law*" (emphasis added). But one would hardly have expected it to say "[n]otwithstanding the provisions of any other law *or of the Constitution*." What the provision directly addresses is the authority to dismiss, not the authority of the courts to review the dismissal. And the Director does *not* have the authority to dismiss in violation of the Constitution, nor could Congress give it to him. The implication of nonreviewability in this text, its manifestation that the action is meant to be "committed to agency discretion," is no weaker with regard to constitutional claims than nonconstitutional claims . . . .

* * *

[30] The Court seeks to downplay the harm produced by today's decision by observing that "petitioner acknowledges that Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court." Assuming that those suits are statutorily

authorized, I am willing to accept the Director's assertion that, while suits regarding hiring or promotion are tolerable, a suit regarding dismissal is not. Like the Court, I have no basis of knowledge on which I could deny that — especially since it is obvious that if the Director thinks that a particular hiring or promotion suit is genuinely contrary to the interests of the United States he can simply make the hiring or grant the promotion, and then dismiss the prospective litigant under § 102(c).

[31] The harm done by today's decision is that, contrary to what Congress knows is preferable, it brings a significant decision-making process of our intelligence services into a forum where it does not belong. Neither the Constitution, nor our laws, nor common sense gives an individual a right to come into court to litigate the reasons for his dismissal as an intelligence agent. It is of course not just *valid* constitutional claims that today's decision makes the basis for judicial review of the Director's action, but all *colorable* constitutional claims, whether meritorious or not. And in determining whether what is colorable is in fact meritorious, a court will necessarily have to review the entire decision. If the Director denies, for example, respondent's contention in the present case that he was dismissed because he was a homosexual, how can a court possibly resolve the dispute without knowing what other good, intelligence-related reasons there might have been? I do not see how any "latitude to control any discovery process" could justify the refusal to permit such an inquiry, at least *in camera*. Presumably the court would be expected to evaluate whether the agent really did fail in this or that secret mission. The documents needed will make interesting reading for district judges (and perhaps others) throughout the country. Of course the Agency can seek to protect itself, ultimately, by an authorized assertion of executive privilege, *United States v. Nixon*, 418 U.S. 683 (1974), but that is a power to be invoked only *in extremis*, and any scheme of judicial review of which it is a central feature is extreme. I would, in any event, not like to be the agent who has to explain to the intelligence services of other nations, with which we sometimes cooperate, that they need have no worry that the secret information they give us will be subjected to the notoriously broad discovery powers of our courts, because, although we have to litigate the dismissal of our spies, we have available a protection of somewhat uncertain scope known as executive privilege, which the President can invoke if he is willing to take the political damage that it often entails.

[32] Today's result, however, will have ramifications far beyond creation of the world's only secret intelligence agency that must litigate the dismissal of its agents. If constitutional claims can be raised in this highly sensitive context, it is hard to imagine where they cannot. The assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid. Also obsolete may be the assumption that we are capable of preserving a sensible common law of judicial review.

[33] I respectfully dissent.

Notes on Webster v. Doe

1. Congress gave a fair amount of discretion to the Director to terminate agents such as Doe. Was § 102(c) of the National Security Act competent to preclude all judicial review of Doe's action, including review of his constitutional claims?

2. As you can see, § 701(a)(2) of the Administrative Procedure Act played a substantial role in this case. If you have already studied Administrative Law, you know that, under this provision, judicial review is precluded if an administrative decision is "committed to agency discretion by law." In this case, Webster argued that, as a statutory matter, the decision about whether Doe's termination "was necessary or advisable in the interests of the United States" was committed entirely to his discretion. The Court unanimously held that it was, at least as a *statutory* matter. The division arose over preclusion of *constitutional* claims.

3. Is Justice Scalia serious when he says that "[t]he first response to the Court's grave doubt about the constitutionality of denying all judicial review to a 'colorable constitutional claim' is that the denial of all judicial review is not at issue here, but merely the denial of review in United States district courts." ¶ [19]. Is he suggesting that, notwithstanding § 102(c) of the National Security Act, Doe could pursue a claim against the Director in *state court*? If, as Justice Scalia argues, § 102(c) is competent to preclude review of Doe's constitutional claims in *federal court*, wouldn't it *also* preclude review of those claims in *state court*? After all, the language of the statute doesn't refer explicitly to *any court*; it simply suggests that the Director shall have final authority to terminate. If the authority is truly final, wouldn't Congress want to operate against the *entire world*, not just federal courts?

4. Ultimately, however, Justice Scalia recognizes that Congress could not have wanted state courts to be able to review claims like Doe's if it did not want federal courts doing the same thing. See ¶ [21]. He then goes to argue, however, that plenty of constitutional issues are, or can be, insulated from constitutional attack, including the claim that "an election has been stolen," an uncompensated taking of property by the federal government, and political questions. See *id.* Do you agree that these questions might lie outside the purview of judicial review? Can the original owner of property sue the federal officer who "takes" it for trespass? If you find Justice Scalia's point persuasive, then what would be wrong with putting yet another set of constitutional claims — Doe's — outside that purview?

5. *Webster v. Doe* is an excellent example of how the Court typically handles statutes that appear to preclude judicial review of constitutional claims. Instead of addressing the "serious constitutional question" that would be presented if Congress tried to preclude such review, the Court does everything in its power to construe the statute in question not to preclude such review. There are many citations to this effect. See, *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (construing the Detainee Treatment Act, as amended, not to preclude review by habeas corpus of challenges by detainees at Guantanamo Bay to military tribunals). These cases are an example of what is called "constitutional avoidance" — interpreting a statute in such a

way as to avoid potential constitutional infirmity. As a consequence, the Court has generally avoided having to decide whether Congress' power to control the jurisdiction of the federal courts is truly plenary.

6. One possible counter-example to this tradition of constitutional avoidance can be found in *Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States*, 321 U.S. 414 (1944). These cases involved the Emergency Price Control Act of 1942, which authorized an administrator to set maximum prices for consumer goods during WWII. Violation of the administrator's orders was punishable as a crime. The act allowed parties aggrieved by such orders to attack them by submitting a protest directly to the administrator within 60 days of an order's promulgation. If the administrator denied their protest, the act authorized them to take their objection to a special Article-III court, the "Emergency Court of Appeals." Otherwise, the act precluded all judicial review of an administrator's order. Section § 204(d) of the act declared:

> The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under [this act]. Except as provided [herein], no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Lockerty and Yakus sold meat at a price above the ceiling set by the administrator and failed to avail themselves of the procedures under the act. Lockerty brought an action in equity against the local federal prosecutor, Phillips, to restrain him from prosecuting him for violating the law. In that action, he argued that the order denied him due process of law. (He contended that the ceiling was set so low as to be confiscatory.) Yakus, meanwhile, was prosecuted for violating an order and tried to defend himself on constitutional grounds. The question presented in both cases was whether Congress could restrict their constitutional attacks to the procedures set forth in the act. In both cases, the Court answered this question in the affirmative.

Lockerty and *Yakus* certainly reflect the so-called "traditional view" of Congress' power to restrict the jurisdiction of the federal courts. On the other hand, the act did provide both Lockerty and Yakus with access to federal court, albeit at a time that was convenient to Congress, not them. In addition, if WWII did not present exigent circumstances, nothing would. If *Lockerty* and *Yakus* are still good law today — which is uncertain — these factors would arguably combine to explain why.

7. The "serious constitutional question" that the Court seeks to avoid in *Webster* and similar cases is whether Congress' power to control the jurisdiction of the federal courts truly is

plenary. As we know, the traditional view holds exactly that. But much modern scholarship cuts in the opposite direction, arguing that federal courts play an essential role in the separation of powers — however that role might be defined — and that Congress may not prevent them from doing so. Leonard Ratner first made this argument, but many others have joined him in one form or another. See, *e.g.*, Leonard Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960). Do you concur in this argument? If so, how do you reconcile it with the apparent text of the Constitution, *McCardle* and *Sheldon v. Sill*? Also, what would that essential role be?

Richard Fallon has made a related argument. Relying principally on *Boumediene v. Bush*, 553 U.S. 723 (2008), Fallon argues that the courts should focus on Congress' *motive* in enacting legislation that purports to strip federal courts of jurisdiction in favor of state courts, upholding laws that Congress enacts for neutral reasons, but striking down those that Congress enacts to undermine the Court's decisions. "[L]egislation should be deemed unconstitutional," he writes, "if its evident *purpose* is to invite state court defiance of past authoritative Supreme Court decisions." Richard H. Fallon, Jr., Jurisdiction-Stripping Reconsidered, 96 Va. L. Rev. 1043, 1052 (2010) (emphasis added); *id.* at 1075 (emphasis added) ("Jurisdiction-stripping legislation such as this would . . . present the question whether it should be deemed *necessary and proper* for Congress to use its power to control federal jurisdiction for the purpose of encouraging state courts to ignore, reject, or defy pertinent precedents."). To unpack this a little more, Fallon argues that inviting state judges to defy decisions by the Court impairs *stare decisis* and related doctrines, which he sees as implicit in Article III's grant of "judicial Power." And underlying this argument is an even broader thesis, again resting on *Boumediene*, that the federal courts see themselves — and should see themselves — as having an irreducible role in the constitutional system. See *id.* at 1062 ("In *Boumediene*[,] the Court treated the judicial branch's function of saying what the law is as ground for holding that the Constitution mandates federal jurisdiction."); *id.* at 1074 ("[I]t should be treated as an open question whether practice and precedent might have established that the federal courts have a broader necessary role in the constitutional scheme today than they were understood to have in 1789.").

In *Boumediene*, Congress had tried to prevent the detainees at Guantanamo Bay from seeking review of their status by habeas corpus. By a 5-4 vote, the Court held that the attempt violated the Suspension Clause of Article I, § 9, cl. [2] ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."). The precise issue presented in the case was whether the clause applied to a non-citizen held on territory that was not formally part of the United States. Writing for the majority, Justice Kennedy concluded that it did.

One impediment to Fallon's thesis lies in the language of *Ex parte McCardle*. As you may recall, McCardle argued that Congress' *motive* in repealing the statute authorizing his appeal to the Supreme Court was improper. Writing for a unanimous Court, Chief Justice Chase responded "We are not at liberty to inquire into the motives of the legislative." 74 U.S. (7 Wall.) 506, 514 (1868). Another impediment, of course, is the actually *holding* in *McCardle*, as well as

the holding in *Sheldon v. Sill*. In thinking this through, one should also bear in mind that *Boumediene* was not literally about Article III; it was about the Suspension Clause. Query how the Court would have responded in *Boumediene* if Congress had explicitly attempted to suspend the writ as per the terms of the clause.

8. The Department of Justice itself has taken a position against the traditional view, at least with respect to the Supreme Court's appellate jurisdiction. See Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. O.L.C. 13 (1982). (This refers to the "opinions of the Office of Legal Counsel," a senior unit in the Department of Justice. According to two commentators, this opinion was supported by Ted Olson, the "Olson" of *Morrison v. Olson*, 487 U.S. 654 (1988), who was head of OLC at the time. It was also supported by William French Smith, the Attorney General. It was *opposed* by John Roberts, at that time an attorney working as a special assistant to the Attorney General. See Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers, 105 Georgetown L.J. 255 (2017).

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

APPEAL from the Circuit Court of Ohio

Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

[1] At the close of the argument, a point was suggested, of such vital importance, as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

[2] The appellants contest the jurisdiction of the Court on two grounds:

[3] 1st. That the act of Congress has not given it.

[4] 2d. That, under the constitution, Congress cannot give it.

[5] 1. The first part of the objection depends entirely on the language of the act. The words are, that the Bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."

[6] These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose.

[7] [Editor's new paragraph.] The argument of the appellants is founded on the opinion of this Court, in *The Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). In that case it was decided, that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the 3d section of that act are, that the Bank may "sue and be sued," &c. "in Courts of record, or any other place whatsoever." The Court was of opinion, that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the Courts of the United States; and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same act, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any Court of record of the United States, or either of them." The express grant of jurisdiction to the federal Courts, in this case, was considered as having some influence on the construction of the general words of the 3d section, which does not mention those Courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in

those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.

[8] The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

[9] 2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the Bank to sue in the federal Courts.

[10] In support of this clause, it is said, that the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws.

[11] [Editor's new paragraph.] If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

[12] This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

[13] The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?

[14] The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law,[a] not on any act of Congress.

[15] If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and

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[a]Editor's note: By "general principles of the law," the Chief Justice and the parties are referring, in the abstract, to the common law, as well as to the principles and usages of equity. More particularly, they are referring to non-federal law.

expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

* * *

[16] We ask, then, if it can be sufficient to exclude [federal] jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. . . . .

[17] [Editor's new paragraph.] On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

[18] We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

[19] The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any

description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependant on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

[20] Take the case of a contract, which is put as the strongest against the Bank.

[21] When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

* * *

[22] It is said, that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connexion; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the Bank.

[23] This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law.

[24] A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the

society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

[25] There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

[26] Upon the best consideration we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

[27] We will now proceed to consider the merits of the cause. [The proceeded to hold largely in the Bank's favor.]

Mr. Justice JOHNSON.

[28] The argument in this cause presents three questions: 1. Has Congress granted to the Bank of the United States, an unlimited right of suing in the Courts of the United States? 2. Could Congress constitutionally grant such a right? and 3. Has the power of the Court been legally and constitutionally exercised in this suit?

[29] I have very little doubt that the public mind will be easily reconciled to the decision of the Court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the States, which renders all the protection necessary, that the general government can give to this Bank. The policy of the decision is obvious, that is, if the Bank is to be sustained; and few will bestow upon its legal correctness, the reflection, that it is necessary to test it by the constitution and laws, under which it is rendered.

* * *

[30] In the present instance, I cannot persuade myself, that the constitution sanctions the vesting of the right of action in this Bank, in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might possibly be raised in it, involving the constitution, or constitutionality of a law, of the United States.

[31] When laws were heretofore passed for raising a revenue by a duty on stamped paper, the tax was quietly acquiesced in, notwithstanding it entrenched so closely on the unquestionable power of the States over the law of contracts; but had the same law which declared void contracts

not written upon stamped paper, declared, that every person holding such paper should be entitled to bring his action "in any Circuit Court" of the United States, it is confidently believed that there could have been but one opinion on the constitutionality of such a provision. The whole jurisdiction over contracts, might thus have been taken from the State Courts, and conferred upon those of the United States. . . . . Nor is the case of the alien, put in argument, at all inapplicable. The one acquires its character of individual property, as the other does his political existence, under a law of the United States; and there is not a suit which may be instituted to recover the one, nor an action of ejectment to be brought by the other, in which a right acquired under a law of the United States, does not lie as essentially at the basis of the right of action, as in the suits brought by this Bank.

* * *

[32] My own conclusion is, that [the words of the statute are] merely declaratory; or, at most, only enacting, in the words of the Court, in the case of *Deveaux*, that the Bank may, by its corporate name and metaphysical existence, bring suit, or personate the natural man, in the Courts specified, as though it were in fact a natural person; that is, in those cases in which, according to existing laws, suits may be brought in the Courts specified respectively.

* * *

Bank of the United States v. Planters' Bank of Georgia
22 U.S. (9 Wheat.) 904 (1824)

THIS cause was brought up on a certificate of a division of opinion between the Judges of the Circuit Court of Georgia, upon the questions arising in it, and was argued by the same counsel with the preceding case of *Osborn v. The Bank of the United States*.

ON CERTIFICATE OF DIVISION OF OPINION
AMONG THE JUDGES OF THE CIRCUIT COURT OF GEORGIA

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

[1] In this case, the petition of the plaintiffs, which, according to the practice of the State of Georgia, is substituted for a declaration, is founded on promissory notes payable to a person named in the note "or bearer," and states that the notes were "duly transferred, assigned and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified, and that the defendants, in consideration of their liability, assumed," &c.

[2] The Planters' Bank pleads to the jurisdiction of the Court, and alleges that it is a corporation of which the State of Georgia, and certain individuals who are citizens of the same state with some of the plaintiffs[,] are members. The plea also alleges that the persons to whom

the notes mentioned in the petition were made payable were citizens of the State of Georgia, and therefore incapable of suing the said Bank in a circuit court of the United States, and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that Court.

[3] To this plea the plaintiffs demurred, and the defendants joined in demurrer.

[4] On the argument of the demurrer, the judges were divided on two questions:

[5] 1. Whether the averments in the declaration be sufficient in law to give this Court jurisdiction of the cause.

[6] 2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment.

[7] The first question was fully considered by the Court in the case of *Osborne v. Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the Court jurisdiction of the cause.

[In this part of the opinion, the Court held that the Planters' Bank could not rely on Georgia's sovereign immunity, even though the state was one of its incorporators, and that § 11 of the Judiciary Act of 1789 (the provision at issue in *Sheldon v. Sill*) was not a bar to jurisdiction because the Bank of the United States was not relying on diversity of citizenship as a basis for jurisdiction.]

[8] We think, then, that the charter gives to the bank a right to sue in the circuit courts of the United States without regard to citizenship, and that the certificate on both questions must be in favor of the plaintiff.

[The dissenting opinion of Justice Johnson is omitted.]

Notes on Osborn and Planters' Bank

1. What does it mean to say that a case "arises under" the laws of the United States? That federal law supplies the plaintiff's cause of action? That a federal issue appears on the face of the plaintiff's well-pleaded complaint? That a federal issue appears *either* in the plaintiff's well-pleaded complaint *or* in the defendant's well-pleaded answer? That a federal issue appears at some point in the exchange of papers, for example, in response to a motion to dismiss, or in a motion for summary judgment? That a federal issue *may appear* at some point? In light of these many contingencies, why not simply allow cases to be *removed* to federal court *if and only if* a potentially dispositive federal issue actually arises?

2. *Get ready for* Erie. In *Osborn*, the parties themselves did not deny the propriety of federal jurisdiction, apart from Osborn's attempt to invoke Ohio's sovereign immunity and

thereby bar the federal courts from hearing the case. Their focus was on other legal issues, primarily on whether the bank's original action against Osborn would lie under the principles and usages of equity.

The Court raised the question of jurisdiction, apparently *sua sponte*, calling the parties back for further argument. Ultimately, Chief Justice Marshall concluded that federal jurisdiction was proper. Congress had authorized the bank to "to sue and be sued . . . in any Circuit Court of the United States." ¶ [7]. This created the *statutory* basis for jurisdiction, he said. He also found a *constitutional* basis for jurisdiction in the fact that a federal issue *could* arise in the case. See ¶ [18] ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause . . . ."); ¶ [21] ("The [federal] question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on."). Thus, he concluded, the case "arose under" the laws of the United States.

Fair enough (at least for now), but — even if a federal court *could* hear the case — what *rule of decision* would resolve it? More particularly, what sovereign would lie behind the bank's *cause of action*? Modern lawyers might say Ohio. After all, the case arose in Ohio, and neither the bank nor the Court cited a federal cause of action. Lawyers in the early nineteenth century, however, were not fastidious about attributing law to a specific sovereign. Instead, they might have emphasized "general principles of the law," ¶ [14], applicable not only in Ohio, and not only in the United States, but wherever the common law prevailed.

Under the principles and usages of the time, argued Osborn's lawyer, one could rarely (if ever) bring an action in equity to restrain a trespass, which — at bottom — is what Ohio had in mind for the bank. One who held an exclusive license could seek equity to restrain invasion of that license, and one could seek equity to prevent "irreparable mischief." *Osborn*, 22 U.S. at 749. But the bank's situation did not fit either of these exceptions, he said. Therefore, he argued *not* that the federal courts lacked *jurisdiction* to hear the case, but that those same courts should have declined to grant injunctive relief, leaving the bank to sue Osborn *at law* after the trespass. The cause of action would have been trover, detinue or replevin.

3. *The Well-Pleaded Complaint Rule?* This rule is a judicial gloss on such statutes as 28 U.S.C. § 1331, and has no bearing on a case like *Osborn*, where statutory jurisdiction is predicated on a distinctly different statute (here, the organic statute that established the bank). But what if — hypothetically — we applied that rule to this case? Or what if the Well-Pleaded Complaint Rule were constitutional in stature? What would happen? As noted above, the bank's actual *cause of action* came from Ohio (at least in modern terms), or from "general principles of the law," in nineteenth-century terms. In neither case, however, did it come from the federal government.

This does not mean, of course, that the case could not satisfy the rule. After all, a plaintiff can bring a *state* cause of action that has a *federal* component. But would the bank's "bill" (the equitable equivalent of a complaint) have included a federal element? The answer seems to be yes. Under the principles and usages of equity, the bank would have had to assert an immunity from Ohio's tax in its bill in equity, and that immunity would have arisen directly from the second holding in *McCulloch v. Maryland*, that states could not tax an instrumentality of the United States, on the theory that the power to tax is "a power to destroy." 17 U.S. 316, 391 (1819). See generally John Harrison, Ex Parte *Young*, 60 Stan. L. Rev. 989, 1015 (2008) ("[As of 1908,] the Court applied the well-pleaded complaint rule to equity cases in a straightforward fashion. It asked whether the issue that would support federal jurisdiction properly appeared in the bill in equity, without asking how it would appear in a related action at law.").

But what if the Court had followed Osborn's lead and held that an action in equity did *not* lie in the bank, on the ground that it had an adequate remedy at law? Would an action *at law* have satisfied the Well-Pleaded Complaint Rule? To answer this question, you would need to ask yourself about the elements of detinue, trover, or replevin. Would the *absence of a privilege* to commit a trespass have been part of the bank's case-in-chief? This seems doubtful. See Harrison, 60 Stan. L. Rev. at 1012 ("Ordinary private torts, such as the trespass alleged in *Osborn*, do not violate federal law. In an officer suit like *Osborn*, the federal question would not arise until a third stage of pleading, in response to the defendant's claim of official privilege."). Thus, the case would have failed the rule.

4. Osborn — *the easy case.* It's hard to deny that *Osborn* "arose under" the laws of the United States. By its tax, Ohio was trying to annihilate the bank, an instrumentality of the federal government, and, as noted above, a federal issue would have appeared on the face of the bank's well-pleaded bill in equity. Thus, the "possibility" that a federal issue might have arisen in the case was entirely beside the point — the horse was out of that barn.

5. Planters' Bank — *the hard case.* But was there a federal issue in *Planters' Bank*? This was an action on a note by the Bank of the United States against a bank with a charter from the State of Georgia. The *cause of action* would have arisen under the "general principles of the law," to use terms from the nineteenth century, or under the law of Georgia, as we would see the matter today. In neither case, however, would its cause of action be a creature of federal law.

Next, we might ask ourselves if a question of federal law would nevertheless have appeared on the face of the bank's well-pleaded complaint. Would it? As we have seen, the bank was suing on a note. In modern terms, a person suing on a negotiable instrument need only allege: (1) an unconditional promise to pay (2) a fixed amount of money (3) on demand or at a time certain. See UCC 3-104. Thus, the Well-Pleaded Complaint Rule would not have been satisfied. Nor, most likely, would a federal issue have appeared in the answer. In fact, it is entirely possible that no federal issue would *ever* have arisen in the case. No matter, said the Court. See *Planters' Bank* ¶¶ [7], [8].

6. Do you agree with *Planters' Bank*? Could Congress authorize federal courts to hear a case in which a federal issue might, but almost certainly will not, arise? The Constitution authorizes federal courts to hear cases "arising under" the laws of the United States. Does a case "arise under" those laws if there's nothing more than a *remote possibility* that such an issue will present itself? In this regard, please note that the Constitution does authorize federal courts to hear several categories of cases out of solicitousness for the *parties*, rather than solicitousness for the *law* at issue. For example, it authorizes federal courts to hear cases where the United States is a party, or where the parties are from different states. See Art. III, § 2, cl. [1]. By the principle of *expressio unius*, doesn't the *affirmative* recognition of these categories of *party-based* jurisdiction preclude others? And, after all, doesn't *Planters' Bank* reduce to an affirmation that Congress may confer *party-based* jurisdiction on all cases involving the bank?

7. *A potential fix?* Could Congress have avoided thorny questions like those asked in the preceding note by enacting a comprehensive body of law to govern actions by and against the bank? For example, could it have granted the bank an express cause of action for suit on a note, thus making a case like *Planters' Bank* squarely "aris[e] under" the law of the United States? The answer in 1824 was probably no, given the limited view at that time of what constituted "Commerce . . . among the several States," but the answer would almost certainly be yes today. The question presented in the actual case, of course, was whether Congress could take the lesser step of conferring jurisdiction, but *not* providing a federal rule of decision to resolve the case. We will see more of this in *Lincoln Mills*.

8. *Are* Osborn *and* Planters' Bank *the products of historical revisionism?* Anthony Bellia has argued that neither *Osborn* nor *Planters' Bank* were quite as radical as we now take them to be. See Anthony J. Bellia Jr., The Origins of Article III "Arising Under" Jurisdiction, 57 Duke L.J. 263 (2007). Although *today* we interpret these cases to require only a "remote federal ingredient" to say that a case "aris[es] under" the laws of the United States, in the nineteenth century parties bringing actions for or against corporations were obliged to allege the *regularity* of the corporations' organization and its *authority* to engage in the transactions at issue in the case. In other words, the Bank of the United States *in fact* had to allege that its organization by Congress was lawful and that it had authority to purchase and sue on notes in its complaint for relief against the Planters' Bank. (Meanwhile, a federal issue would have appeared on the bank's bill in equity against Osborn even under standard rules of pleading.) Do ¶¶ [18] and [21] of *Osborn* make more sense in light of Bellia's reading?

9. *Other constitutional grounds for jurisdiction.* Apart from "arising under" jurisdiction, did anything else in the Extending Clause reach *Osborn* or *Planters' Bank*? Although Congress had *created* the bank, it was not legally "the United States." Therefore, jurisdiction could not be predicated on the grounds that the United States was a party to the case. Nor could the case have been predicated on diversity of citizenship. Under legal doctrine in force at the time, a corporation's "citizenship" was irrelevant. What mattered was the citizenship of the people who owned it. Thus, if even one person who held stock in the bank lived in Ohio

— and surely there were many such persons — diversity would have been lacking. As counsel for Osborn argued:

> This Court has determined, that the right of a corporation to litigate in the Courts of the Union, depends upon the character (as to citizenship) of the members which compose the body corporate, and that a corporation, as such, cannot be a citizen, within the meaning of the constitution. There is here no averment on the record, that the plaintiffs have a right to sue, upon the ground of the corporation being citizens of a different State from the defendants; nor could such averment have been made, consistently with the truth of the fact.

Osborn, 22 U.S. at 813.

10. *The "Capacity Clause" as the predicate for statutory jurisdiction.* As noted above, the Court justified *statutory* jurisdiction in terms of a clause in the bank's organic act, by which the bank was authorized "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." ¶ [5]. Was this a fair construction of this language? Osborn objected that this language merely breathed life into the bank as a juridical entity, enabling it to "sue and be sued" as itself, and dissenting Justice Johnson took the same position. See ¶ [7] (Osborn); ¶ [32] (Justice Johnson). The alternative — which was a significant possibility in the early nineteenth century — was that people who held shares in the bank would have to sue *collectively* as parties plaintiff, or that people seeking to bring an action *against* the bank would have to sue them *collectively* as parties defendant. The Capacity Clause eliminated this necessity. Did the Court err in attributing greater significance to it than this?

However you answer this question, please note that the Court has recently confirmed that Capacity Clauses are competent to grant statutory jurisdiction. See *American National Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992). For a recent case distinguishing *American National Red Cross*, see *Lightfoot v. Cendant Mortgage Corp.*, 137 S.Ct. 553 (2017). In this case, the Court held that the words "to sue and be sued, and to complain and defend, in any court of competent jurisdiction, State or Federal," which appear in Fannie Mae's charter, do *not* authorize the federal courts to hear any case for or against Fannie Mae. The unanimous Court concluded that the words "State or Federal" simply modified the phrase "any court of competent jurisdiction," implying that a court could only hear a case involving Fannie Mae if it had a basis for jurisdiction *other than* this provision.

11. *Sovereign immunity?* Should Osborn have been able to rely on Ohio's sovereign immunity? Was the bank's action against Osborn himself, or was he just a stand-in for the state? This is a complex question. The Eleventh Amendment and related doctrines do not protect *officials* as such from the judicial process, except where the state is the real party in interest. Here, Osborn had formal custody of the specie — silver, in this case — that had been seized from the bank, and the bank was merely seeking its return. Arguably, then, the action was

against *him*, not the state. The bank's counsel, Mr. Clay, emphasized this point in oral argument, noting that Osborn's concession that an action in trespass might lie in the bank after the seizure conclusively established that the state had no legal status in the case:

> The State is not a formal party on the record; and that the State is not necessarily a party, by the reason of its incidental interest, is conceded by the admission, that the Bank might have recovered in trover, trespass, or detinue, against the defendants, who actually took the money.

22 U.S. (9 Wheat.) 738, 797 (1824). On the other hand, of course, Osborn only had formal custody of the silver *because* he was Ohio's auditor.

The bank's lawyer, Mr. Clay, later took a much more aggressive stance against sovereign immunity, arguing that states may not assert immunity against claims arising under federal law:

> But even if the State be a party, that circumstance would not oust the jurisdiction of the Court, in a case arising under the constitution and laws of the Union. There the nature of the controversy, and not the character of the parties, must determine the question of jurisdiction. . . . . It is competent for Congress to determine what Court shall have jurisdiction in this class of cases, which it has done as to the Bank, by giving it, the right of suing in the Circuit Courts of the Union.

Id. at 798. We will discuss this theory at length when we take up the Eleventh Amendment.

Later, Mr. Clay makes yet another argument for the proposition that Ohio's sovereign immunity does not apply to the case. In this argument, he emphasizes that the original coercive impetus in the case lay entirely with Ohio. After all, Ohio wanted taxes *from* the bank; the bank wanted only to be left alone. The functional plaintiff, he suggested, was the state:

> The whole case is to be considered according to its true nature and character, which is, that of a proceeding by the State to recover a tax or penalty; and the Bank resorts to its natural protector for defence, by means of an injunction, which is a parental, preventive, peaceable remedy.

Id. at 799. This last argument reflects a revisionist point that John Harrison has made. See John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 990 (2008) ("Sovereign immunity permits private people to assert defenses against the government, so a suit against an officer that enforces a defense is consistent with sovereign immunity, not an exception to it . . . .").

12. *Why all the hostility?* Why was Ohio so hostile to the bank? Was it really the monster that cases like *McCulloch* and *Osborn* suggest?

Many state-chartered banks had emerged between 1811, when the first Bank of the United States' charter had expired, and 1816, when the second bank's charter had taken effect. In a manner of speaking, these state-chartered banks were generating their own "money" — evidences of indebtedness that circulated from person to person. (Justice Johnson described this phenomenon in a portion of his dissent that has not been excerpted.)

The evidences generated by these state-chartered banks were not backed up by "specie." That is, a person could not present them to one of these banks for gold or silver. The very existence of such "money" might have violated the Constitution, which forbids any state from "emit[ting] Bills of Credit." Art. I, § 10, cl. [1]. In any case, the Bank of the United States refused to accept such evidences in satisfaction of indebtedness. Thus, when it *acquired* a debt — through assignment, let's say — it demanded payment in a currency that few people possessed. Here's how the Ohio Historical Society puts the matter (emphasis added):

> [As a result of the Panic of 1819, many] Ohioans were losing their farms and businesses, and there was a shortage of national currency in the state. [Ethan A. Brown, Ohio's seventh governor,] and his supporters blamed the National Bank of the United States for Ohio's economic woes. *The National Bank's branch in Chillicothe refused to take any state money, insisting on the use of federal currency backed by gold or silver instead.* As there was not enough of this currency, known as specie, in circulation, many Ohioans were not able to pay back debts owed to the National Bank. In an attempt to reduce the power of the National Bank in Ohio, the state legislature passed a law taxing the National Bank in early 1819. Legislators went so far as to authorize the seizure of fifty thousand dollars from each of the two branches of the bank operating in the state to pay the taxes owed. This set the state in direct opposition to the federal government. . . . .

In "The Paws of Banks": The Origins and Significance of Kentucky's Decision to Tax Federal Bankers, 1818-1820, 9 J. Early Rep. 457, 457 (1989), Sandra F. VanBurkleo makes similar observations about the state of affairs in Kentucky at the time:

> On the eve of the Panic of 1819 (or so the story runs), Second Bank [of the United States] monetary and credit contractions came to be viewed, by state legislators and bankers alike, as *the* primary cause of financial distress, and as a malicious attempt by latter-day Hamiltonians to destroy state-chartered banks and consolidate federal control over American money markets.

And *id.* at 476:

> [D]uring the November term of 1819, the Second Bank obtained summary judgments in ten actions of debt, nine of them by default [from an inferior federal court with jurisdiction over Kentucky]. These developments did not bode well for

hundreds of other Bluegrass traders and banknote endorsers, whose days of reckoning had been postponed by a crowded docket.

[5] **National Mutual Ins. Co. v. Tidewater Transfer Co.**
337 U.S. 582 (1949)

MR. JUSTICE JACKSON announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK and MR. JUSTICE BURTON join.

[1] This case calls up for review a holding that it is unconstitutional for Congress to open federal courts in the several states to action by a citizen of the District of Columbia against a citizen of one of the states. The petitioner, as plaintiff, commenced in the United States District Court for Maryland an action for a money judgment on a claim arising out of an insurance contract. No cause of action under the laws or Constitution of the United States was pleaded, jurisdiction being predicated only upon an allegation of diverse citizenship. The diversity set forth was that plaintiff is a corporation created by District of Columbia law, while the defendant is a corporation chartered by Virginia, amenable to suit in Maryland by virtue of a license to do business there. The learned District Judge concluded that, while this diversity met jurisdictional requirements under the Act of Congress, it did not comply with diversity requirements of the Constitution as to federal jurisdiction, and so dismissed. The Court of Appeals, by a divided court, affirmed. . . . . The controversy obviously was an appropriate one for review here and writ of certiorari issued in the case.

[2] The history of the controversy begins with that of the Republic. In defining the cases and controversies to which the judicial power of the United States could extend, the Constitution included those "between Citizens of different States." In the Judiciary Act of 1789, Congress created a system of federal courts of first instance and gave them jurisdiction of suits "between a citizen of the State where the suit is brought, and a citizen of another State." In 1804, the Supreme Court, through Chief Justice Marshall, held that a citizen of the District of Columbia was not a citizen of a State within the meaning and intendment of this Act.[9] This decision closed federal courts in the states to citizens of the District of Columbia in diversity cases, and for 136 years they remained closed. In 1940 Congress enacted the statute challenged here. It confers on such courts jurisdiction if the action "Is between citizens of different States, citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." The issue here depends upon, the validity of this Act, which, in substance, was reenacted by a later Congress as part of the Judicial Code.

[3] Before concentrating on detail, it may be well to place the general issue in a larger perspective. This constitutional issue affects only the mechanics of administering justice in our federation. It does not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms. Those rights and freedoms do not include immunity from suit by a citizen of Columbia or exemption from process of the federal courts. Defendant concedes that it can presently be sued in some court of law, if not this one, and it grants that Congress may make it suable at plaintiff's complaint in some, if not this, federal court.

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[9] *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805).

Defendant's contention only amounts to this: that it cannot be made to answer this plaintiff in the particular court which Congress has decided is the just and convenient forum.

[4] The considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states, are not present here. In mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times. . . . .

[5] Our first inquiry is whether, under the third, or Judiciary, Article of the Constitution, extending the judicial power of the United States to cases or controversies "between Citizens of different States," a citizen of the District of Columbia has the standing of a citizen of one of the states of the Union. This is the question which the opinion of Chief Justice Marshall answered in the negative, by way of dicta if not of actual decision. *Hepburn & Dundas v. Ellzey*. . . . .

[Justice Jackson then discussed this decision.]

[6] To now overrule this early decision of the Court on this point and hold that the District of Columbia is a state would, as that opinion pointed out, give to the word "state" a meaning in the Article which sets up the judicial establishment quite different from that which it carries in those Articles which set up the political departments and in other Articles of the instrument. While the word is one which can contain many meanings, such inconsistency in a single instrument is to be implied only where the context clearly requires it. There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia in connection with the judiciary. This is not strange, for the District was then only a contemplated entity. But, had they thought of it, there is nothing to indicate that it would have been referred to as a state and much to indicate that it would have required special provisions to fit its anomalous relationship into the new judicial system, just as it did to fit it into the new political system.

* * *

[7] We therefore decline to overrule [*Hepburn & Dundas*], and we hold that the District of Columbia is not a state within Article III of the Constitution. In other words, cases between citizens of the District and those of the states were not included in the catalogue of controversies over which the Congress could give jurisdiction to the federal courts by virtue of Art. III.

[8] This conclusion does not, however, determine that Congress lacks power under other provisions of the Constitution to enact this legislation. Congress, by the Act in question, sought not to challenge or disagree with the decision of Chief Justice Marshall that the District of Columbia is not a state for such purposes. It was careful to avoid conflict with that decision by

basing the new legislation on powers that had not been relied upon by the First Congress in passing the Act of 1789.

[9] The Judiciary Committee of the House of Representatives recommended the Act of April 20, 1940, as "a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories." This power the Constitution confers in broad terms. By Art. I, Congress is empowered "to exercise exclusive Legislation in all Cases whatsoever, over such District." And of course it was also authorized "To make all Laws which shall be necessary and proper for carrying into Execution" such powers. . . . .

[10] It is elementary that the exclusive responsibility of Congress for the welfare of the District includes both power and duty to provide its inhabitants and citizens with courts adequate to adjudge not only controversies among themselves but also their claims against, as well as suits brought by, citizens of the various states. It long has been held that Congress may clothe District of Columbia courts not only with the jurisdiction and powers of federal courts in the several states but with such authority as a state may confer on her courts. The defendant here does not challenge the power of Congress to assure justice to the citizens of the District by means of federal instrumentalities, or to empower a federal court within the District to run its process to summon defendants here from any part of the country. And no reason has been advanced why a special statutory court for cases of District citizens could not be authorized to proceed elsewhere in the United States to sit, where necessary or proper, to discharge the duties of Congress toward District citizens.

[11] However, it is contended that Congress may not combine this function, under Art. I, with those under Art. III, in district courts of the United States. Two objections are urged to this. One is that no jurisdiction other than specified in Art. III can be imposed on courts that exercise the judicial power of the United States thereunder. The other is that Art. I powers over the District of Columbia must be exercised solely within that geographic area.

[12] Of course there are limits to the nature of duties which Congress may impose on the constitutional courts vested with the federal judicial power. The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because "behind the words of the constitutional provisions are postulates which limit and control." Chief Justice Hughes in *Monaco v. Mississippi*, 292 U.S. 313, 323 (1934). The permeative nature of this doctrine was early recognized during the Constitutional Convention. Objection that the present provision giving federal courts jurisdiction of cases arising "under this Constitution" would permit usurpation of nonjudicial functions by the federal courts was overruled as unwarranted since it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 Farrand, Records of the Federal Convention 430. And this statute reflects that doctrine. It does not authorize or require either the district courts or this Court to participate in any legislative, administrative, political or other nonjudicial function or to render any advisory opinion. The jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other

controversies handled by the same courts being the fact that one party is a District citizen. Nor has the Congress by this statute attempted to usurp any judicial power. It has deliberately chosen the district courts as the appropriate instrumentality through which to exercise part of the judicial functions incidental to exertion of sovereignty over the District and its citizens.

[13] Unless we are to deny to Congress the same choice of means through which to govern the District of Columbia that we have held it to have in exercising other legislative powers enumerated in the same Article, we cannot hold that Congress lacked the power it sought to exercise in the Act before us.

* * *

[14] We conclude that where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship. [For example,] when Congress deems that for such purposes it owes a forum to claimants and trustees [in cases of bankruptcy], it may execute its power in this manner. The Congress, with equal justification, apparently considers that it also owes such a forum to the residents of the District of Columbia in execution of its power and duty under the same Article. We do not see how the one could be sustained and the other denied.

[15] We therefore hold that Congress may exert its power to govern the District of Columbia by imposing the judicial function of adjudication [of] justiciable controversies on the regular federal courts which under the Constitution it has the power to ordain and establish and which it may invest with jurisdiction and from which it may withhold jurisdiction "in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

[16] The argument that congressional powers over the District are not to be exercised outside of its territorial limits also is pressed upon us. But this same contention has long been held by this Court to be untenable. . . . .

* * *

[17] . . . . The judgment is

Reversed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE MURPHY agrees, concurring.

[18] I join in the Court's judgment. But I strongly dissent from the reasons assigned to support it in the opinion of MR. JUSTICE JACKSON.

* * *

I.

* * *

[19] . . . . I see no warrant for gymnastic expansion of the jurisdiction of federal courts outside the District. At least as to these latter courts sitting in the states, I have thought it plain that Article III described and defined their "judicial Power," and that where "power proposed to be conferred . . . was not judicial power within the meaning of the Constitution . . . (it) was, therefore, unconstitutional, and could not lawfully be exercised by the courts." If Article III were no longer to serve as the criterion of district court jurisdiction, I should be at a loss to understand what tasks, within the constitutional competence of Congress, might not be assigned to district courts. At all events, intimations that district courts could only undertake the determination of "justiciable" controversies seem inappropriate, since the very clause of Article I today relied on has long been regarded as the source of the "legislative" and "administrative" powers of the courts of the District of Columbia. Moreover, the suggestion that the Constitutional Convention recognized a constructive limitation of federal jurisdiction to "cases of a Judiciary nature," merely lays bare the ultimate fallacy underlying rejection of the boundaries of Article III. For the constructive limitation referred to in the Convention debates is a limitation imposed by Article III, and the opinion of MR. JUSTICE JACKSON by hypothesis denies that Article III expresses the full measure of power which can be delegated to federal district courts. If district courts are — as I agree they are — confined to "cases of a Judiciary nature," then too they are confined to cases "between citizens of different States," except insofar as other Article III provisions expand the potential grant of jurisdiction. . . . .

* * *

II.

[20] However, nothing but naked precedent, the great age of the *Hepburn* ruling, and the prestige of Marshall's name, supports [the retaining that decision]. It is doubtful whether anyone could be found who now would write into the Constitution such an unjust and discriminatory exclusion of District citizens from the federal courts. All of the reasons of justice, convenience, and practicality which have been set forth for allowing District citizens a furtive access to federal courts, point to the conclusion that they should enter freely and fully as other citizens and even aliens do.

* * *

III.

* * *

[21] I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it. Despite its great age and subsequent acceptance, I think the *Hepburn* decision was ill-considered and wrongly decided. Nothing hangs on it now except the continuance or removal of a gross and wholly anomalous inequality applied against a substantial group of American citizens, not in relation to their substantive rights, but in respect to the forums available for their determination. This Court has not hesitated to override even long-standing decisions when much more by way of substantial change was involved and the action taken was much less clearly justified than in this case, a most pertinent instance being *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[22] That course should be followed here. It should be followed directly, not deviously. Although I agree with the Court's judgment, I think it overrules the *Hepburn* decision in all practical effect. With that I am in accord. But I am not in accord with the proposed extension of "legislative" jurisdiction under Article I for the first time to the federal district courts outside the District of Columbia organized pursuant to Article III, and the consequent impairment of the latter Article's limitations upon judicial power; and I would dissent from such a holding even more strongly than I would from a decision today reaffirming the *Hepburn* ruling. That extension, in my opinion, would be the most important part of today's decision, were it accepted by a majority of the Court. It is a dangerous doctrine which would return to plague both the district courts and ourselves in the future, to what extent it is impossible to say. . . . .

[The dissenting opinions of Chief Justice Vinton, joined by Justice Douglas, and of Justice Frankfurter, joined by Justice Reed, are omitted.]

Notes on Tidewater

1. What's the big deal here? As Justice Jackson observes, Congress could certainly create courts to hear cases between citizens of the District and citizens of other states under Art. I, § 8, cl. [17] (the "D.C. Clause"). In addition, it could authorize those courts to sit outside the District for the parties' convenience. See ¶¶ [3], [9]-[10]. So, he asks, where's the harm in authorizing an Article III court to hear the same case? There's nothing unusual about the case itself, he adds. It's justiciable; it's a suit on a contract. See ¶ [12]. So why the fuss?

2. Does the answer lie in the possibility that his argument proves too much? That is, if Congress may authorize federal courts to hear cases outside the Extending Clause, why may it not authorize federal courts to give advisory opinions? After all, argues Justice Rutledge in his separate opinion, the exclusion of the District from diversity jurisdiction and the ban on advisory opinions both come from Article III. See ¶ [19]. To put this another way, if Article I allows

Congress to override the limits of Article III for some purposes, why not for all purposes? Is there some underlying spirit to Article III, as Justice Jackson contends, that would limit Congress' powers under Article I? See ¶ [12].

3. Would you have overruled *Hepburn & Dundas v. Ellzey* (1805)? Doing this would have made *Tidewater* easy, because then the Diversity Clause, Art. III, § 2, cl. [1], would squarely have comprehended a case between a citizen of the District and a citizen of a state. As of 1949, however, *Hepburn & Dundas* was 144 years old. Is there a statute of limitations to overruling a case? Apart from this, are you persuaded by Justice Jackson's argument that recognizing the District as a state for purposes of Article III might have caused problems under other provisions of the Constitution? See ¶ [6]. For example, if the District really were a state under Article III, might it be entitled to elect Senators and Representatives under Article I? Could the District be a "state" for some purposes but not others?

4. What's the holding of *Tidewater*? As you can see, three members of the Court — Justices Jackson, Black and Burton — were willing to allow Article-III courts to hear cases outside the four corners of Article III, provided the cases were justiciable in nature. But three votes does not a holding make. Meanwhile, two members of the Court — Justices Rutledge and Murphy — were willing to overrule *Hepburn & Dundas v. Ellzey*. Together, their five votes supported the *disposition* of the case. Their rationales, however, were not only different but contradictory. That is, the Justices who were willing to overrule *Hepburn & Dundas* were not willing to allow Article-III courts to perform non-Article-III business, and the Justices who were willing to allow those courts to perform such business were themselves not willing to overrule *Hepburn & Dundas*. So what do we say is the holding of the case?

Tidewater's "holding," therefore, is pretty thin: Congress has authority — but we don't know why — to authorize Article-III courts to hear cases between citizens of the District and citizens of states. Thus, 28 U.S.C. § 1332(e) is valid in insofar as it construes "States" to include the District. To this day, *Tidewater* is cited for this proposition. And, with a "*cf.*," a similar claim is made with respect to cases between citizens of territories and citizens of states.

Tidewater provides an excellent example of how *collegial courts* operate in the United States. Judges do not agree on *rationales*; they agree on *dispositions*. Because five members of the Court agreed to *reverse* the decision below, the case was so disposed. The mutual exclusivity of the rationales was not a bar to disposition of the case on these grounds.

Paradoxically, *Tidewater* is often cited for the rationales that shifting majorities of the Court *rejected*. That is, because six members of the Court *rejected* Justice Jackson's argument that Article-III courts could hear non-Article-III cases, so long as they're justiciable in nature, *Tidewater* is often cited for the proposition that Congress may *not* do this. Similarly, *Tidewater* could be cited for the proposition that *Hepburn & Dundas* is still good law, because an even greater majority of the Court — seven members — rejected that proposition.

Textile Workers Union v. Lincoln Mills
353 U.S. 448 (1957)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

[1] Petitioner union entered into a collective bargaining agreement in 1953 with respondent employer, the agreement to run one year and from year to year thereafter, unless terminated on specified notices. The agreement provided that there would be no strikes or work stoppages, and that grievances would be handled pursuant to a specified procedure. The last step in the grievance procedure — a step that could be taken by either party — was arbitration.

[2] This controversy involves several grievances that concern work loads and work assignments. The grievances were processed through the various steps in the grievance procedure, and were finally denied by the employer. The union requested arbitration, and the employer refused. Thereupon the union brought this suit in the District Court to compel arbitration.

[3] The District Court concluded that it had jurisdiction, and ordered the employer to comply with the grievance arbitration provisions of the collective bargaining agreement. The Court of Appeals reversed by a divided vote. . . . . The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and the contrariety of views in the courts.

[4] The starting point of our inquiry is § 301 of the Labor Management Relations Act of 1947, which provides [in relevant part]:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce[,] or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce . . . and any employer whose activities affect commerce . . . shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

[5] There has been considerable litigation involving § 301, and courts have construed it differently. There is one view that § 301(a) merely gives federal district courts jurisdiction in

controversies that involve labor organizations in industries affecting commerce, without regard to diversity of citizenship or the amount in controversy. Under that view, § 301(a) would not be the source of substantive law; it would neither supply federal law to resolve these controversies nor turn the federal judges to state law for answers to the questions. Other courts — the overwhelming number of them — hold that § 301(a) is more than jurisdictional — that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements, and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. Perhaps the leading decision representing that point of view is the one rendered by Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, 113 F.Supp. 137 (D. Mass. 1953). That is our construction of § 301(a), which means that the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be specifically enforced.

[6] From the face of the Act it is apparent that § 301(a) and § 301(b) supplement one another. Section 301(b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301(b) in other words provides the procedural remedy lacking at common law. Section 301(a) certainly does something more than that. Plainly, it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of § 301(b). The question is whether § 301(a) is more than jurisdictional.

* * *

[7] To be sure, there is a great medley of ideas reflected in the hearings, reports, and debates on this Act. Yet . . . the entire tenor of the history indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement. And when in the House the debate narrowed to the question whether § 301 was more than jurisdictional, it became abundantly clear that the purpose of the section was to provide the necessary legal remedies. Section 302 of the House bill, the substantial equivalent of the present § 301, was being described by Mr. Hartley, the sponsor of the bill in the House:

> MR. BARDEN. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation.
>
> It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the

Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.

MR. HARTLEY. The interpretation the gentleman has just given of that section is absolutely correct.

[8] It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule, discussed in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

[9] The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

* * *

Reversed.

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

[The opinion of Justice Burton, joined by Justice Harlan, concurring in the result, is omitted.]

MR. JUSTICE FRANKFURTER, dissenting.

[10] The Court has avoided the difficult problems raised by § 301 of the Taft-Hartley Act, by attributing to the section an occult content. This plainly procedural section is transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining. I have set forth in my opinion in *Employees v. Westinghouse Corp.* the detailed reasons why I believe that § 301 cannot be so construed, even if constitutional questions cannot be avoided. 348 U.S. 437, 441-49, 452-59 (1955). But the Court has a "clear" and contrary conclusion emerge from the

"somewhat," to say the least, "cloudy and confusing legislative history." This is more than can be fairly asked even from the alchemy of construction. Since the Court relies on a few isolated statements in the legislative history which do not support its conclusion, however favoringly read, I have deemed it necessary to set forth in an appendix the entire relevant legislative history of the Taft-Hartley Act and its predecessor, the Case Bill. This legislative history reinforces the natural meaning of the statute as an exclusively procedural provision, affording, that is, an accessible federal forum for suits on agreements between labor organizations and employers, but not enacting federal law for such suits.

* * *

[11] The Court, however, sees no problem of "judicial power" in casting upon the federal courts, with no guides except "judicial inventiveness," the task of applying a whole industrial code that is as yet in the bosom of the judiciary. There are severe limits on "judicial inventiveness" even for the most imaginative judges. The law is not a "brooding omnipresence in the sky," (Mr. Justice Holmes, dissenting, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917)), and it cannot be drawn from there like nitrogen from the air. These problems created by the Court's interpretation of § 301 cannot "be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another . . . ." But the Court makes § 301 a mountain instead of a molehill and, by giving an example of "judicial inventiveness," it thereby solves all the constitutional problems that would otherwise have to be faced.

* * *

[12] . . . . Since I do not agree with the Court's conclusion that federal substantive law is to govern in actions under § 301, I am forced to consider the serious constitutional question that was adumbrated in the *Westinghouse* case, the constitutionality of a grant of jurisdiction to federal courts over contracts that came into being entirely by virtue of state substantive law, a jurisdiction not based on diversity of citizenship, yet one in which a federal court would, as in diversity cases, act in effect merely as another court of the State in which it sits. The scope of allowable federal judicial power that this grant must satisfy is constitutionally described as "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." While interpretive decisions are legion under general statutory grants of jurisdiction strikingly similar to this constitutional wording, it is generally recognized that the full constitutional power has not been exhausted by these statutes.[a]

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[a]Editor's note: In other words, for example, Congress could eliminate the Well-Pleaded Complaint Rule, which applies to such statutes as 28 U.S.C. §§ 1331 and 1441, allowing federal courts to hear cases in which a federal issue appears only in the answer, or perhaps even later in

[13] Almost without exception, decisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. *E.g.*, *Gully v. First National Bank*, 299 U.S. 109 (1936). Although it has sometimes been suggested that the "cause of action" must derive from federal law, see *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).[b] The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.

[14] In a few exceptional cases, arising under special jurisdictional grants, the criteria by which the prominence of the federal question is measured against constitutional requirements have been found satisfied under circumstances suggesting a variant theory of the nature of these requirements. The first, and the leading case in the field, is *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). There, Chief Justice Marshall sustained federal jurisdiction in a situation — hypothetical in the case before him but presented by the companion case of *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824) — involving suit by a federally incorporated bank upon a contract. Despite the assumption that the cause of action and the interpretation of the contract would be governed by state law, the case was found to "arise under the laws of the United States" because the propriety and scope of a federally granted authority to enter into contracts and to litigate might well be challenged. This reasoning was subsequently applied to sustain jurisdiction in actions against federally chartered railroad corporations. *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). The traditional interpretation of this series of cases is that federal jurisdiction under the "arising" clause of the Constitution, though limited to cases involving potential federal questions, has such flexibility that Congress may confer it whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question.[c]

[15] The views expressed in *Osborn* and the *Pacific Railroad Removal Cases* were severely restricted in [decisions] constructing general [statutory] grants of jurisdiction. But the Court later sustained [the following] jurisdictional section of the Bankruptcy Act of 1898:

> The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees [in bankruptcy] and adverse claimants concerning the property acquired

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the case, so long as the issue actually "aris[es]" in the case.

[b]Editor's note: This is essentially a restatement of the Well-Pleaded Complaint Rule.

[c]Editor's note: Justice Frankfurter here adverts to the so-called "remote federal ingredient test" of *Osborn* and related cases.

> or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Under this provision the trustee could pursue in a federal court a private cause of action arising under and wholly governed by state law. *Schumacher v. Beeler*, 293 U.S. 367 (1934); *Williams v. Austrian*, 331 U.S. 642 (1947). To be sure, the cases did not discuss the basis of jurisdiction. It has been suggested that they merely represent an extension of the approach of the *Osborn* case; the trustee's right to sue might be challenged on obviously federal grounds — absence of bankruptcy or irregularity of the trustee's appointment or of the bankruptcy proceedings. So viewed, this type of litigation implicates a potential federal question.

[16] Apparently relying on the extent to which the bankruptcy cases involve only remotely a federal question, Justice Jackson concluded in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), that Congress may confer jurisdiction on the District Courts [beyond the bounds of Article III] as incidental to its powers under Article I. No attempt was made to reconcile this view with the restrictions of Article III; a majority of the Court recognized that Article III defined the bounds of valid jurisdictional legislation and rejected the notion that jurisdictional grants can go outside these limits.

[17] With this background, many theories have been proposed to sustain the constitutional validity of § 301. In *Textile Workers Union of America v. American Thread Co.*, 113 F. Supp. 137, 140 (D. Mass. 1953), Judge Wyzanski suggested, among other possibilities, that § 301 might be read as containing a direction that controversies affecting interstate commerce should be governed by federal law incorporating state law by reference, and that such controversies would then arise under a valid federal law as required by Article III. Whatever may be said of the assumption regarding the validity of federal jurisdiction under an affirmative declaration by Congress that state law should be applied as federal law by federal courts to contract disputes affecting commerce, we cannot argumentatively legislate for Congress when Congress has failed to legislate. To do so disrespects legislative responsibility and disregards judicial limitations.

[18] Another theory, relying on *Osborn* and the bankruptcy cases, has been proposed which would achieve results similar to those attainable under Mr. Justice Jackson's view [set forth in *Tidewater*], but which purports to respect the "arising" clause of Article III. See Hart and Wechsler, The Federal Courts and the Federal System; Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216. Called "protective jurisdiction," the suggestion is that[,] in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer "true" federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law. Analysis of the "protective jurisdiction" theory might also be attempted in terms of the language of Article III — construing "laws" to include jurisdictional statutes where Congress could have legislated substantively in a field. This is but another way of

saying that[,] because Congress could have legislated substantively and thereby could give rise to litigation under a statute of the United States, it can provide a federal forum for state-created rights although it chose not to adopt state law as federal law or to originate federal rights.

[19] Surely the truly technical restrictions of Article III are not met or respected by a beguiling phrase that the greater power here must necessarily include the lesser. In the compromise of federal and state interests leading to distribution of jealously guarded judicial power in a federal system, it is obvious that very different considerations apply to cases involving questions of federal law and those turning solely on state law. It may be that the ambiguity of the phrase "arising under the laws of the United States" leaves room for more than traditional theory could accommodate. But, under the theory of "protective jurisdiction," the "arising under" jurisdiction of the federal courts would be vastly extended. For example, every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case. At least in *Osborn* and the bankruptcy cases, a substantive federal law was present somewhere in the background. But this theory rests on the supposition that Congress could enact substantive federal law to govern the particular case. It was not held in those cases, nor is it clear, that federal law could be held to govern the transactions of all persons who subsequently become bankrupt, or of all suits of a Bank of the United States.[d]

[20] "Protective jurisdiction," once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III. "Protective jurisdiction" is a misused label for the statute we are here considering. That rubric is properly descriptive of safeguarding some of the indisputable, staple business of the federal courts. It is a radiation of an existing jurisdiction. "Protective jurisdiction" cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined. The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of Article III. That this "protective" theory was not adopted by Chief Justice Marshall at a time when conditions might have presented more substantial justification strongly suggests its lack of constitutional merit. Moreover, Congress in its consideration of § 301 nowhere suggested dissatisfaction with the ability of state courts to administer state law properly. Its concern was to provide access to the federal courts for easier enforcement of state-created rights.

[21] Another theory also relies on *Osborn* and the bankruptcy cases as an implicit recognition of the propriety of the exercise of some sort of "protective jurisdiction" by the federal

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[d]Editor's note: Justice Frankfurter raises an intriguing question here. Could Congress — in 1957 — enact a comprehensive body of law to govern transactions by a new version of the Bank of the United States? Although he implies that the answer to this question would be no, perhaps he's wrong on this point. Is the doubt about commercial transactions involving people who go on declare bankruptcy any stronger?

courts. Professor Mishkin tends to view the assertion of such a jurisdiction, in the absence of any exercise of substantive powers, as irreconcilable with the "arising" clause since the case would then arise only under the jurisdictional statute itself, and he is reluctant to find a constitutional basis for the grant of power outside Article III. Professor Mishkin also notes that the only purpose of such a statute would be to insure impartiality to some litigant, an objection inconsistent with Article III's recognition of "protective jurisdiction" only in the specified situation of diverse citizenship. But where Congress has "an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area — including those substantively governed by state law." In such cases, the protection being offered is not to the suitor, as in diversity cases, but to the "congressional legislative program." Thus he supports § 301: "even though the rules governing collective bargaining agreements continue to be state-fashioned, nonetheless the mode of their application and enforcement may play a very substantial part in the labor-management relations of interstate industry and commerce — an area in which the national government has labored long and hard."

[22] Insofar as state law governs the case, Professor Mishkin's theory is quite similar to that advanced by Professors Hart and Wechsler and followed by the Court of Appeals for the First Circuit: The substantive power of Congress, although not exercised to govern the particular "case," gives "arising under" jurisdiction to the federal courts despite governing state law. [This second] theory has the dubious advantage of limiting incursions on state judicial power to situations in which the State's feelings may have been tempered by early substantive federal invasions.

[23] Professor Mishkin's theory of "protective jurisdiction" may find more constitutional justification if there is not merely an "articulated and active" congressional policy regulating the labor field but also federal rights existing in the interstices of actions under § 301. Therefore, before resting on an interpretation of § 301 that would compel a declaration of unconstitutionality, we must . . . defer to the strong presumption — even as to such technical matters as federal jurisdiction — that Congress legislated in accordance with the Constitution.
. . . .

* * *

[24] There is a point, however, at which the search may be ended with less misgiving regarding the propriety of judicial infusion of substantive provisions into § 301. The contribution of federal law might consist in postulating the right of a union, despite its amorphous status as an unincorporated association, to enter into binding collective-bargaining contracts with an employer. The federal courts might also give sanction to this right by refusing to comply with any state law that does not admit that collective bargaining may result in an enforceable contract. It is hard to see what serious federal-state conflicts could arise under this view. At most, a state court might dismiss the action, while a federal court would entertain it. Moreover, such a function of federal law is closely related to the removal of the procedural

barriers to suit. Section 301 would be futile if the union's status as a contracting party were not recognized. The statement in § 301(b) that the acts of the agents of the union are to be regarded as binding upon the union may be used in support of this conclusion. This provision, not confined in its application to suits in the District Court under § 301(a), was primarily directed to responsibility of the union for its agents' actions in authorizing strikes or committing torts. It can be construed, however, as applicable to the formation of a contract. So applied, it would imply that a union must be regarded as contractually bound by the acts of its agents, which in turn presupposes that the union is capable of contract relations.

[25] Of course, the possibility of a State's law being counter to such a limited federal proposition is hypothetical, and to base an assertion of federal law on such a possibility, one never considered by Congress, is an artifice. And were a State ever to adopt a contrary attitude, its reasons for so doing might be such that Congress would not be willing to disregard them. But these difficulties are inherent in any attempt to expand § 301 substantively to meet constitutional requirements.

[26] Even if this limited federal "right" were read into § 301, a serious constitutional question would still be present. It does elevate the situation to one closely analogous to that presented in *Osborn v. Bank of the United States*. Section 301 would, under this view, imply that a union is to be viewed as a juristic entity for purposes of acquiring contract rights under a collective-bargaining agreement, and that it has the right to enter into such a contract and to sue upon it. This was all that was immediately and expressly involved in the *Osborn* case, although the historical setting was vastly different, and the juristic entity in that case was completely the creature of federal law, one engaged in carrying out essential governmental functions. Most of these special considerations had disappeared, however, at the time and in the circumstances of the decision of the *Pacific Railroad Removal Cases*. There is force in the view that regards the latter as a "sport" and finds that the Court has so viewed it. See *Gully v. First National Bank*, 299 U.S. 109, 113-14 (1936) ("Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them."). The question is whether we should now so consider it and refuse to apply its holding to the present situation.

[27] I believe that we should not extend the precedents of *Osborn* and the *Pacific Railroad Removal Cases* to this case, even though there be some elements of analytical similarity. *Osborn*, the foundation for the *Removal Cases*, appears to have been based on premises that today, viewed in the light of the jurisdictional philosophy of *Gully v. First National Bank*, are subject to criticism. The basic premise was that every case in which a federal question might arise must be capable of being commenced in the federal courts, and when so commenced it might, because jurisdiction must be judged at the outset, be concluded there despite the fact that the federal question was never raised. Marshall's holding was undoubtedly influenced by his fear that the bank might suffer hostile treatment in the state courts that could not be remedied by an appeal on an isolated federal question. There is nothing in Article III that affirmatively supports the view that original jurisdiction over cases involving federal questions must extend to

every case in which there is the potentiality of appellate jurisdiction. We also have become familiar with removal procedures that could be adapted to alleviate any remaining fears by providing for removal to a federal court whenever a federal question was raised. In view of these developments, we would not be justified in perpetuating a principle that permits assertion of original federal jurisdiction on the remote possibility of presentation of a federal question. Indeed, Congress, by largely withdrawing the jurisdiction that the *Pacific Railroad Removal Cases* recognized, and this Court, by refusing to perpetuate it under general grants of jurisdiction, see *Gully v. First National Bank*, have already done much to recognize the changed atmosphere.

[28] Analysis of the bankruptcy power also reveals a superficial analogy to § 301. The trustee enforces a cause of action acquired under state law by the bankrupt. Federal law merely provides for the appointment of the trustee, vests the cause of action in him, and confers jurisdiction on the federal courts. Section 301 similarly takes the rights and liabilities which under state law are vested distributively in the individual members of a union and vests them in the union for purposes of actions in federal courts, wherein the unions are authorized to sue and be sued as an entity. While the authority of the trustee depends on the existence of a bankrupt and on the propriety of the proceedings leading to the trustee's appointment, both of which depend on federal law, there are similar federal propositions that may be essential to an action under § 301. Thus, the validity of the contract may in any case be challenged on the ground that the labor organization negotiating it was not the representative of the employees concerned, a question that has been held to be federal, or on the ground that subsequent change in the representative status of the union has affected the continued validity of the agreement. . . . . Consequently, were the bankruptcy cases to be viewed as dependent solely on the background existence of federal questions, there would be little analytical basis for distinguishing actions under § 301.

[29] [Editor's new paragraph.] But the bankruptcy decisions may be justified by the scope of the bankruptcy power, which may be deemed to sweep within its scope interests analytically outside the "federal question" category, but sufficiently related to the main purpose of bankruptcy to call for comprehensive treatment. Also, although a particular suit may be brought by a trustee in a district other than the one in which the principal proceedings are pending, if all the suits by the trustee, even though in many federal courts, are regarded as one litigation for the collection and apportionment of the bankrupt's property, a particular suit by the trustee, under state law, to recover a specific piece of property might be analogized to the ancillary or pendent jurisdiction cases in which, in the disposition of a cause of action, federal courts may pass on state grounds for recovery that are joined to federal grounds.

[30] If there is in the phrase "arising under the laws of the United States" leeway for expansion of our concepts of jurisdiction, the history of Article III suggests that the area is not great and that it will require the presence of some substantial federal interest, one of greater weight and dignity than questionable doubt concerning the effectiveness of state procedure. The bankruptcy cases might possibly be viewed as such an expansion. But even so, not merely convenient judicial administration but the whole purpose of the congressional legislative

program — conservation and equitable distribution of the bankrupt's estate in carrying out the constitutional power over bankruptcy — required the availability of federal jurisdiction to avoid expense and delay. Nothing pertaining to § 301 suggests vesting the federal courts with sweeping power under the Commerce Clause comparable to that vested in the federal courts under the bankruptcy power.

[31] In the wise distribution of governmental powers, this Court cannot do what a President sometimes does in returning a bill to Congress. We cannot return this provision to Congress and respectfully request that body to face the responsibility placed upon it by the Constitution to define the jurisdiction of the lower courts with some particularity and not to leave these courts at large. Confronted as I am, I regretfully have no choice. For all the reasons elaborated in this dissent, even reading into § 301 the limited federal rights consistent with the purposes of that section, I am impelled to the view that it is unconstitutional in cases such as the present ones where it provides the sole basis for exercise of jurisdiction by the federal courts.

Notes on Lincoln Mills

1. Did this case "aris[e] under" the laws of the United States? If so, how? What rule of decision actually would actually control? According to Justice Douglas and the majority, the rule of decision would be a rule of federal common law, created by the federal courts pursuant to implied authority in § 301(a) of the statute. See ¶¶ [5], [9]. Does this work for you?

2. Do you read § 301(a) to grant such authority? According to Justice Douglas, such authority may be inferred from the fact that Congress wanted to repudiate the rule at common law that executory agreements to arbitrate were unenforceable. See ¶ [8]. If some states retained that rule, he implied, and federal courts hearing cases under § 301(a) were to apply *state law*, actions to compel arbitration would fail in those states, contrary to Congress' intent. Does this persuade you, or do you agree with Justice Frankfurter that the majority has found "occult content" in § 301(a)? See ¶ [10]?

3. If you *do* find authority in § 301(a) for federal courts to create a body of federal common law, is that okay? May Congress delegate to the federal courts authority to do such a thing? Before you say "no" — if that was your inclination — please bear in mind that the federal courts arguably have been doing exactly that with respect to cases in admiralty since 1789. See Ernest A. Young, The Last Brooding Omnipresence: *Erie Railroad Co. v. Tompkins* and the Unconstitutionality of Preemptive Federal Maritime Law, 43 St. Louis Univ. L.J. 1349, 1351 (1999). In addition, federal courts conventionally construe the Sherman Antitrust Act in this manner. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

Furthermore, don't courts in the Anglo-American system have *inherent* authority to create common law? After all, the Supreme Court of Kentucky (or its predecessor) has been doing so since its inception. In fact, that Court has struck down various attempts by the General Assembly to *undo* principles of the common law that it (or its predecessor) adopted under the so-called "jural-rights doctrine." See *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932) (invalidating a statute that prohibited a non-paying passenger from suing a motorist for negligence); *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998) (invalidating a statute that required a finding of intent to support an award of punitive damages); Ky. Const. § 14 ("All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); *id.* § 54: ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); *id.* § 241 ("Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death . . . ."). Are federal courts somehow different? Are they somehow ineligible to sit in the tradition of the common law?

4. If you do *not* read § 301(a) as giving federal courts authority to establish a body of common law, you find yourself in the boat with Justice Frankfurter, trying to determine whether Congress may authorize federal courts to hear cases in which the rule of decision is *not* federal, yet the case is said to "aris[e] under" the laws of the United States. This, he says, is unsupportable, at least in a case like *Lincoln Mills*.

5. *An easy fix?* Could Congress have made *Lincoln Mills* an easy case by enacting a comprehensive set of rules to govern contracts between labor and management in industries with a substantial relation to interstate commere? The answer appears to be yes, at least as of the late New Deal. See, for example, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). But the question here — as it was with *Osborn* — is whether Congress could take the *lesser step* of authorizing federal jurisdiction but enacting no rules of decision, in other words, allowing the laws of the states to control. See ¶ [18] (discussing Hart and Wechsler's theory of "protective jurisdiction"). Justice Frankfurter says he is not taken in by this "beguiling" argument. See ¶ [19]. Do you find this argument beguiling? Why or why not?

6. If you find yourself in agreement with Justice Frankfurter, how do you reconcile his position with the Court's apparent *approval* of "protective jurisdiction" in a wide variety of cases, including *Osborn* itself (or at least *Planters' Bank*), the *Pacific Railroad Removal Cases*, and the two bankruptcy cases he cites, *Schumacher v. Beeler* and *Williams v. Austrian*? Are these cases all distinguishable from *Lincoln Mills*? On what grounds? Were the federal issues somehow *less latent* in these cases as they were in *Lincoln Mills*? Did the United States somehow have more of a dog in the fight? Were these earlier cases simply wrong? Justice Frankfurter is fairly clear in describing the *Pacific Railroad Removal Cases* as wrong. See ¶ [26] ("There is force in the view that regards the latter as a "sport" . . . ."). He also intimates that the Court has rejected the broad reach of *Osborn*. See ¶ [27] ("*Osborn*, the foundation for the *Removal Cases*, appears to have been based on premises that today . . . are subject to criticism.).

If you find yourself inclined to see these earlier cases as wrong — with the possible exception of *Osborn*, which seems to be right by any standard of evaluation — how optimistic are you that *bankruptcy* (for example) could work if every case sounding in contract or tort between the trustee in bankruptcy and a non-diverse party had to be heard in *state court*? Perhaps it would. After all, a trial is a trial, and a court is a court. But even Justice Frankfurter accepts the correctness of *Schumacher* and *Williams v. Austrian*. See ¶ [29]-[30] (providing various grounds to distinguish bankruptcy from the case at bar). Would you do the same?

7. *Removal as a substitute?* Justice Frankfurter argues that legal practice has evolved to the point where *removal* of a case that suddenly becomes federal is a sufficient substitute for authorizing a federal court to hear such a case *ab initio*, before a federal issue has actually arisen in the case. See ¶ [27] ("We . . . have become familiar with removal procedures that could be adapted to alleviate any remaining fears by providing for removal to a federal court whenever a federal question was raised."). Is he correct? Is the possibility of removal in the middle of litigation an adequate (and feasible) substitute for original federal jurisdiction? Would the federal court be obliged to give deference to any previous decisions by the state court?

[6] **Verlinden B.V. v. Central Bank of Nigeria**
461 U.S. 480 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

[1] We granted certiorari to consider whether the Foreign Sovereign Immunities Act of 1976, by authorizing a foreign plaintiff to sue a foreign state in a United States district court on a nonfederal cause of action, violates Article III of the Constitution.

I

[2] On April 21, 1975, the Federal Republic of Nigeria and petitioner Verlinden B.V., a Dutch corporation with its principal offices in Amsterdam[,] entered into a contract providing for the purchase of 240,000 metric tons of cement by Nigeria. The parties agreed that the contract would be governed by the laws of the Netherlands and that disputes would be resolved by arbitration before the International Chamber of Commerce, Paris, France.

[3] The contract provided that the Nigerian Government was to establish an irrevocable, confirmed letter of credit for the total purchase price through Slavenburg's Bank in Amsterdam. According to petitioner's amended complaint, however, respondent Central Bank of Nigeria, an instrumentality of Nigeria, improperly established an unconfirmed letter of credit payable through Morgan Guaranty Trust Co. in New York.[1]

[4] In August 1975, Verlinden subcontracted with a Liechtenstein corporation, Interbuco, to purchase the cement needed to fulfill the contract. Meanwhile, the ports of Nigeria had become clogged with hundreds of ships carrying cement, sent by numerous other cement suppliers with whom Nigeria also had entered into contracts. In mid-September, Central Bank unilaterally directed its correspondent banks, including Morgan Guaranty, to adopt a series of amendments to all letters of credit issued in connection with the cement contracts. Central Bank also directly notified the suppliers that payment would be made only for those shipments approved by Central Bank two months before their arrival in Nigerian waters.

[4] Verlinden then sued Central Bank in the United States District Court for the Southern District of New York, alleging that Central Bank's actions constituted an anticipatory breach of the letter of credit. Verlinden alleged jurisdiction under the Foreign Sovereign Immunities Act,

[1]Morgan Guaranty acted solely as an advising bank; it undertook no independent responsibility for guaranteeing the letter of credit.

28 U.S.C. § 1330.[4] Respondent moved to dismiss for, among other reasons, lack of subject-matter and personal jurisdiction.

[5] The District Court first held that a federal court may exercise subject-matter jurisdiction over a suit brought by a foreign corporation against a foreign sovereign. Although the legislative history of the [Act] does not clearly reveal whether Congress intended [it] to extend to actions brought by foreign plaintiffs, [the judge] reasoned that the language of the Act is "broad and embracing. It confers jurisdiction over 'any nonjury civil action' against a foreign state." Moreover, in the District Court's view, allowing *all* actions against foreign sovereigns, including those initiated by foreign plaintiffs, to be brought in federal court was necessary to effectuate "the Congressional purpose of concentrating litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertions of sovereign immunity." The District Court also held that Art. III subject-matter jurisdiction extends to suits by foreign corporations against foreign sovereigns, stating:

> [The Act] imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that 'arises under' a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity. In short, the Immunities Act injects an essential federal element into all suits brought against foreign states.

[6] The District Court nevertheless dismissed the complaint, holding that a foreign instrumentality is entitled to sovereign immunity unless one of the exceptions specified in the Act applies. After carefully considering each of the exceptions upon which petitioner relied, the District Court concluded that none applied, and accordingly dismissed the action.

[7] The Court of Appeals for the Second Circuit affirmed, but on different grounds. The court agreed with the District Court that the Act was properly construed to permit actions brought by foreign plaintiffs. The court held, however, that the Act exceeded the scope of Art. III of the

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[4]Title 28 U.S.C. § 1330 provides [in relevant part]:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

* * *

Constitution. In the view of the Court of Appeals, neither the Diversity Clause[6] nor the "Arising Under" Clause of Art. III is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns; accordingly it concluded that Congress was without power to grant federal courts jurisdiction in this case, and affirmed the District Court's dismissal of the action. We granted certiorari, and we reverse and remand.

II

[8] For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country. In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall concluded that, while the jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns. Although the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.

[9] As *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches — in particular, those of the Executive Branch — on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

[10] Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns. But in the so-called Tate Letter, the State Department announced its adoption of the "restrictive" theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.

[11] The restrictive theory was not initially enacted into law, however, and its application proved troublesome. As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by "suggestions of immunity" from the State Department. As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.

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[6]The Foreign Diversity Clause provides that the judicial power extends "to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., Art. III, § 2, cl. 1.

[12] An additional complication was posed by the fact that foreign nations did not always make requests to the State Department. In such cases, the responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions. Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied.

[13] In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.

[14] For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity. A foreign state is normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, § 1605(a)(1), and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, § 1605(a)(2). When one of these or the other specified exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." § 1606.

[15] The Act expressly provides that its standards control in "the courts of the United States and of the States," § 1604, and thus clearly contemplates that such suits may be brought in either federal or state courts. However, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area," H.R. Rep. No. 94-1487, the Act guarantees foreign states the right to remove any civil action from a state court to a federal court, § 1441(d). The Act also provides that any claim permitted under the Act may be brought from the outset in federal court, § 1330(a). If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction. In such a case, the foreign state is also ensured immunity from the jurisdiction of state courts by § 1604.

III

[16] The District Court and the Court of Appeals both held that the Foreign Sovereign Immunities Act purports to allow a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied. We agree.

[17] On its face, the language of the statute is unambiguous. The statute grants jurisdiction over "any nonjury civil action against a foreign state . . . with respect to which the

foreign state is not entitled to immunity," 28 U.S.C. § 1330(a). The Act contains no indication of any limitation based on the citizenship of the plaintiff.

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IV

[18] We now turn to the core question presented by this case: whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law.

[19] This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution. Within Art. III of the Constitution, we find two sources authorizing the grant of jurisdiction in the Foreign Sovereign Immunities Act: the Diversity Clause and the "Arising Under" Clause.[17] The Diversity Clause, which provides that the judicial power extends to controversies between "a State, or the Citizens thereof, and foreign States," covers actions by citizens of States. Yet diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs, since a foreign plaintiff is not "a State, or [a] Citize[n] thereof." We conclude, however, that the "Arising Under" Clause of Art. III provides an appropriate basis for the statutory grant of subject-matter jurisdiction to actions by foreign plaintiffs under the Act.

[20] The controlling decision on the scope of Art. III "arising under" jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Court upheld the constitutionality of a statute that granted the Bank of the United States the right to sue in federal court on causes of action based upon state law. There, the Court concluded that the "judicial department may receive . . . the power of construing every . . . law" that "the Legislature may constitutionally make." The rule was laid down that

> it [is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction.

[21] *Osborn* thus reflects a broad conception of "arising under" jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law. The breadth of that conclusion has been questioned. It has been observed that, taken at its broadest, *Osborn* might be read as permitting "assertion of

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[17]In view of our conclusion that proper actions by foreign plaintiffs under the Foreign Sovereign Immunities Act are within Art. III "arising under" jurisdiction, we need not consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called "protective jurisdiction."

original federal jurisdiction on the remote possibility of presentation of a federal question." *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 482 (1957) (Frankfurter, J., dissenting). We need not now resolve that issue or decide the precise boundaries of Art. III jurisdiction, however, since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding. Rather, a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly "arises under" federal law, as that term is used in Art. III.

[22] By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.

[23] To promote these federal interests, Congress exercised its Art. I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States. The statute must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a).[20] At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies — and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction.

[24] In reaching a contrary conclusion, the Court of Appeals relied heavily upon decisions construing 28 U.S.C. § 1331, the statute which grants district courts general federal-question jurisdiction over any case that "arises under" the laws of the United States. The court placed particular emphasis on the so-called "well-pleaded complaint" rule, which provides, for purposes of *statutory* "arising under" jurisdiction, that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense. See, *e.g.*, *Louisville & Nashville R. Co. v. Mottley*, 211 U. S. 149 (1908). In the view of the Court of Appeals, the question of foreign sovereign immunity in this case arose solely as a defense, and not on the face of Verlinden's well-pleaded complaint.

[25] Although the language of § 1331 parallels that of the "Arising Under" Clause of Art. III, this Court never has held that statutory "arising under" jurisdiction is identical to Art. III

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[20]The House Report on the Act states that "sovereign immunity is an affirmative defense which must be specially pleaded." Under the Act, however, subject-matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act.

"arising under" jurisdiction. Quite the contrary is true. Section 1331, the general federal-question statute, although broadly phrased,

> has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the [statute's] function as a provision in the mosaic of federal judiciary legislation. *It is a statute, not a Constitution, we are expounding.*

Romero v. International Terminal Operating Co., 358 U. S. 354, 379 (1959) (emphasis added). In an accompanying footnote, the Court further observed: "Of course the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." . . . . As [this and other] decisions make clear, Art. III "arising under" jurisdiction is broader than federal-question jurisdiction under § 1331, and the Court of Appeals' heavy reliance on decisions construing that statute was misplaced.

[26] In rejecting "arising under" jurisdiction, the Court of Appeals also noted that 28 U.S.C. § 1330 is a jurisdictional provision. Because of this, the court felt its conclusion compelled by prior cases in which this Court has rejected congressional attempts to confer jurisdiction on federal courts simply by enacting jurisdictional statutes. In *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800), for example, this Court found that a statute purporting to confer jurisdiction over actions "where an alien is a party" would exceed the scope of Art. III if construed to allow an action solely between two aliens. And in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451-453 (1852), the Court, while upholding a statute granting jurisdiction over vessels on the Great Lakes as an exercise of maritime jurisdiction, rejected the view that the jurisdictional statute itself constituted a federal regulation of commerce upon which "arising under" jurisdiction could be based.

[27] From these cases, the Court of Appeals apparently concluded that a jurisdictional statute can never constitute the federal law under which the action arises, for Art. III purposes. Yet the statutes at issue in these prior cases sought to do nothing more than grant jurisdiction over a particular class of cases. As the Court stated in *The Propeller Genesee Chief*: "The law . . . contains no regulations of commerce. . . . . *It merely confers a new jurisdiction on the district courts; and this is its only object and purpose.* . . . . It is evident . . . that Congress, in passing [the law], did not intend to exercise their power to regulate commerce . . . ." (Emphasis added.)

[28] In contrast, in enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Art. I powers. As the House Report clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity." [T]he jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access

to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law; and applying those standards will generally require interpretation of numerous points of federal law. Finally, if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States — manifestly, "the title or right set up by the party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction." *Osborn*. That the inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction does not affect the constitutionality of Congress' action in granting federal courts jurisdiction over cases calling for application of this comprehensive regulatory statute.

[29] Congress, pursuant to its unquestioned Art. I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, [it] deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States. The resulting jurisdictional grant is within the bounds of Art. III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Art. III.

V

[30] A conclusion that the grant of jurisdiction in the Foreign Sovereign Immunities Act is consistent with the Constitution does not end the case. An action must not only satisfy Art. III but must also be supported by a statutory grant of subject-matter jurisdiction. As we have made clear, deciding whether statutory subject-matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies.

[31] In the present case, the District Court, after satisfying itself as to the constitutionality of the Act, held that the present action does not fall within any specified exception. The Court of Appeals, reaching a contrary conclusion as to jurisdiction under the Constitution, did not find it necessary to address this statutory question. Accordingly, on remand the Court of Appeals must consider whether jurisdiction exists under the Act itself. If the Court of Appeals agrees with the District Court on that issue, the case will be at an end. If, on the other hand, the Court of Appeals concludes that jurisdiction does exist under the statute, the action may then be remanded to the District Court for further proceedings.

It is so ordered.

Notes on Verlinden

1. The *statutory* basis for jurisdiction in this case is clear — the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330. See ¶¶ [16]-[17]. The real question is whether there's a *constitutional* basis for jurisdiction. Is there?

Take a close look at the Extending Clause, Art. III, § 2, cl. [1]. Apart from "arising under," do any of the heads of jurisdiction comprehend this case? What was Verlinden's citizenship? Was the Central Bank of Nigeria a citizen of a foreign state? A foreign state?

2. Let's talk now about "arising under" jurisdiction. According to the majority, this case arose under the laws of the United States because those laws determined whether the Central Bank of Nigeria was amenable to suit in the courts of the United States. This, the majority said, entailed an application of substantive federal law. See ¶¶ [23], [28]-[29]. It might have added that allowing the federal court that first made this determination to continue to preside over the case would conserve judicial resources.

Do you find this argument persuasive? Isn't determining whether the bank may assert sovereign immunity the same thing as determining whether the federal court has jurisdiction? If a court *has* jurisdiction over a case simply by virtue of deciding *whether* it has jurisdiction to hear a case, does Article III impose any limits at all? (In this regard, please bear in mind that courts *always* have enough jurisdiction to determine whether they have jurisdiction.) Is there a response to this argument?

3. Let's assume for a moment that the bank was *not* immune. Would any federal issues have remained in the case? Under the contract between Verlinden and the bank, Dutch law would provide the rule of decision, not the law of the United States (assuming there were a body of federal law to govern a dispute over letters of credit between a foreign citizen and an instrumentality of a foreign government).

4. Is § 1330 an example of protective jurisdiction, notwithstanding Chief Justice Burger's statement to the contrary? See ¶ [19] n.17. If so, is it an example of *justifiable* protective jurisdiction? What interest do the courts of the United States have in a dispute about a letter of credit between a foreign citizen and an instrumentality of a foreign government?

5. *A little bit about public international law.* By and large, states (such as France or Japan) enjoy immunity from judicial process except insofar as they allow themselves to be sued. To be clear, however, they enjoy this immunity because each state accords each other state such treatment in its own courts. See ¶¶ [8]-[9] (discussing *The Schooner Exchange*). Over the years, however, distinctions have arisen between "public" and "commercial" acts of a state. For public acts, states continue to enjoy immunity, but for commercial acts they often do not. 28 U.S.C. § 1330 codifies this practice. See ¶¶ [10]-[14]. Query how the Central Bank of Nigeria would have fared under this analysis. To the extent it operated as Nigeria's equivalent of our Federal

Reserve, it might have enjoyed sovereign immunity. To the extent it operated as a cement broker, however, it might not have.

6. *Personal jurisdiction.* You may have noted that the Central Bank of Nigeria moved to dismiss for lack of subject-matter as well as personal jurisdiction. Although the Court did not emphasize the distinction, settled practice at the time of the founding was that a court could not exercise jurisdiction over the "person" of a sovereign state absent that sovereign's consent. Thus, sovereign immunity and personal jurisdiction were closely linked. See Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1565 (2001-2002) ("For members of the Founding generation who believed in sovereign immunity, the concept was relevant to *personal* jurisdiction rather than *subject matter* jurisdiction.").

7. *The Well-Pleaded Complaint Rule — Again.* As you can see, the Second Circuit relied in part on this rule in denying jurisdiction. See ¶ [24]. According to that court, because the bank's claim of sovereign immunity — valid or not — would arise only as a *defense* to Verlinden's action, jurisdiction was not available under § 1330. The Court made short work of this, emphasizing that the rule is a *statutory gloss* on such provisions as 28 U.S.C. § 1331, not a function of constitutional law. Therefore, it does not automatically apply to other jurisdictional statutes, including — most particularly — § 1330. In other words, Congress may impose, or refuse to impose, the rule on such statutes, as it sees fit. See ¶ [25].

Mesa v. California
489 U.S. 121 (1989)

JUSTICE O'CONNOR delivered the opinion of the Court.

[1] We decide today whether United States Postal Service employees may, pursuant to 28 U.S.C. § 1442(a)(1), remove to Federal District Court state criminal prosecutions brought against them for traffic violations committed while on duty.

I

[2] In the summer of 1985 petitioners Kathryn Mesa and Shabbir Ebrahim were employed as mailtruck drivers by the United States Postal Service in Santa Clara County, California. In unrelated incidents, the State of California issued criminal complaints against petitioners, charging Mesa with misdemeanor-manslaughter and driving outside a laned roadway after her mailtruck collided with and killed a bicyclist, and charging Ebrahim with speeding and failure to yield after his mailtruck collided with a police car. Mesa and Ebrahim were arraigned in the San Jose Municipal Court of Santa Clara County on September 16 and October 2, 1985, respectively. The Municipal Court set a pretrial conference in Mesa's case for November 4, 1985, and set trial for Ebrahim on November 7, 1985.

[3] On September 24 and October 4, 1985, the United States Attorney for the Northern District of California filed petitions in the United States District Court for the Northern District of California for removal to that court of the criminal complaints brought against Ebrahim and Mesa. The petitions alleged that the complaints should properly be removed to the Federal District Court pursuant to 28 U.S.C. § 1442(a)(1) because Mesa and Ebrahim were federal employees at the time of the incidents and because "the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service." The Santa Clara County District Attorney filed responsive motions to remand, contending that the State's actions against Mesa and Ebrahim were not removable under § 1442(a)(1). The District Court granted the United States Government's petitions for removal and denied California's motions for remand.

[4] California thereupon petitioned the Court of Appeals for the Ninth Circuit to issue a writ of mandamus compelling the District Court to remand the cases to the state court. The Court of Appeals consolidated the petitions, and a divided panel held that "federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense." Accordingly, the Court of Appeals issued a writ of mandamus ordering the District Court to deny the United States' petitions for removal and remand the prosecutions for trial in the California state courts. We granted the United States' petition for certiorari on behalf of Mesa and Ebrahim to resolve a conflict among the Courts of Appeals concerning the proper interpretation of § 1442(a)(1). We now affirm.

II

[5] The removal provision at issue in this case, 28 U.S.C. § 1442(a), provides:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * *

[6] The United States and California agree that Mesa and Ebrahim, in their capacity as employees of the United States Postal Service, were "person[s] acting under" an "officer of the United States or any agency thereof" within the meaning of § 1442(a)(1). Their disagreement concerns whether the California criminal prosecutions brought against Mesa and Ebrahim were

"for act[s] under color of such office" within the meaning of that subsection. The United States, largely adopting the view taken by the Court of Appeals for the Third Circuit in *Pennsylvania v. Newcomer*, 618 F.2d 246 (1980), would read "under color of office" to permit removal "whenever a federal official is prosecuted for the manner in which he has performed his federal duties . . . ." California, following the Court of Appeals below, would have us read the same phrase to impose a requirement that some federal defense be alleged by the federal officer seeking removal.

A

[7] On numerous occasions in the last 121 years we have had the opportunity to examine § 1442(a) or one of its long line of statutory forebears. In *Willingham v. Morgan*, 395 U.S. 402, 405 (1969), we traced the "long history" of the federal officer removal statute from its origin in the Act of February 4, 1815, as a congressional response to New England's opposition to the War of 1812, through its expansion in response to South Carolina's 1833 threats of nullification, and its further expansion in the Civil War era as the need to enforce revenue laws became acute, to enactment of the Judicial Code of 1948 when the removal statute took its present form encompassing all federal officers. "The purpose of all these enactments," we concluded, "is not hard to discern. As this Court said . . . in *Tennessee v. Davis*, 100 U.S. 257, 263 (1880), the Federal Government

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of its members.

[8] *Tennessee v. Davis* involved a state murder prosecution brought against a revenue collector who claimed that, while he was in the act of seizing an illegal distillery under the authority of the federal revenue laws, "he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire," killing one of the assailants. Davis sought to remove the prosecution to federal court and Tennessee challenged the constitutionality of the removal statute. Justice Strong framed the question presented thus:

> Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, *when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein?*

(Emphasis added.) Justice Strong's emphasis on the presence of a federal defense unifies the entire opinion. He thought it impossible that the Constitution should so weaken the Federal Government as to prevent it from protecting itself against unfriendly state legislation which "may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws [or] may deny the authority conferred by those laws."

[9] Despite these references to a federal defense requirement, the United States argues that Davis justified the killing solely on grounds of self-defense and that the question whether Davis' act of self-defense was actually justified is purely a question of state law, there being no "federal common law of 'justification' applicable to crimes committed by federal employees in the performance of their duties . . . ." Thus, the Government concludes, despite much contrary language in the opinion, the fact that we approved the removal of Davis' prosecution demonstrates that no federal defense is necessary to effect removal.

[10] What the Government fails to note is that the successful legal defense of "self-defense" depends on the truth of two distinct elements: that the act committed was, in a legal sense, an act of self-defense, and that the act was justified, that is, warranted under the circumstances. In Davis' case, the truth of the first element depended on a question of federal law: was it Davis' duty under federal law to seize the distillery? If Davis had merely been a thief attempting to steal his assailants' property, returning their fire would simply not have been an act of self-defense, pretermitting any question of justification. Proof that Davis was not a thief depended on the federal revenue laws and provided the necessary predicate for removal. . . . .

* * *

[11] Although we have not always spoken with the same clarity that [such] decisions [as *Davis*] evince, we have not departed from the requirement that federal officer removal must be predicated on the allegation of a colorable federal defense.

[Justice O'Connor then discussed several of the Court's decisions.]

[12] In sum, an unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of a federal defense.

* * *

C

[13] The Government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting § 1442(a), Congress would not have "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). In *Verlinden*, we discussed the

distinction between "jurisdictional statutes" and "the federal law under which [an] action arises, for Art. III purposes," and recognized that pure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction. In *Verlinden* we held that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, is a "comprehensive scheme" comprising both pure jurisdictional provisions and federal law capable of supporting Art. III "arising under" jurisdiction.

[14] Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged. Adopting the Government's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems. We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt.

[15] At oral argument the Government urged upon us a theory of "protective jurisdiction" to avoid these Art. III difficulties. In *Willingham,* we recognized that Congress' enactment of federal officer removal statutes since 1815 served "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts." The Government insists that the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal. More important, the Government suggests that this generalized congressional interest in protecting federal officers from state court interference suffices to support Art. III "arising under" jurisdiction.

[16] We have, in the past, not found the need to adopt a theory of "protective jurisdiction" to support Art. III "arising under" jurisdiction, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In these prosecutions, no state court hostility or interference has even been alleged by petitioners and we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions.

[17] It is hardly consistent with [federalism] to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions. We are simply unwilling to credit the Government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic

violations and other crimes for which they would have no federal defense in immunity or otherwise. That is certainly not the case in the prosecutions of Mesa and Ebrahim, nor was it the case in the removal of the state prosecutions of federal revenue agents that confronted us in our early decisions. In those cases where true state hostility may have existed, it was specifically directed against federal officers' efforts to carry out their federally mandated duties. . . . .

[18] [T]the present language of § 1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks. Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense. Accordingly, the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

[19] While I concur in the judgment and opinion of the Court, I write separately to emphasize a point that might otherwise be overlooked. In most routine traffic-accident cases like those presented here, no significant federal interest is served by removal; it is, accordingly, difficult to believe that Congress would have intended the statute to reach so far. It is not at all inconceivable, however, that Congress' concern about local hostility to federal authority could come into play in some circumstances where the federal officer is unable to present any "federal defense." The days of widespread resistance by state and local governmental authorities to Acts of Congress and to decisions of this Court in the areas of school desegregation and voting rights are not so distant that we should be oblivious to the possibility of harassment of federal agents by local law enforcement authorities. Such harassment could well take the form of unjustified prosecution for traffic or other offenses, to which the federal officer would have no immunity or other federal defense. The removal statute, it would seem to me, might well have been intended to apply in such unfortunate and exceptional circumstances.

[20] The Court today rightly refrains from deciding whether removal in such a situation is possible, since that is not the case before us. But the Court leaves open the possibility that where a federal officer is prosecuted because of local hostility to his function, "careful pleading, demonstrating the close connection between the state prosecution and the federal officer's performance of his duty, might adequately replace the specific averment of a federal defense." With the understanding that today's decision does not foreclose the possibility of removal in such circumstances even in the absence of a federal defense, I join the Court's opinion.

Notes on Mesa

Does *Mesa* implicitly validate Justice Frankfurter's dissent in *Lincoln Mills*? See ¶ [13] ("In *Verlinden*, we discussed the distinction between 'jurisdictional statutes' and 'the federal law under which [an] action arises, for Art. III purposes,' and recognized that pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases'

cannot support Art. III 'arising under' jurisdiction."). Before you say yes, please bear in mind that in 1992, only three years after *Mesa*, the Court allowed the Red Cross to remove *any case* against it to federal court, even a case sounding only in tort where the parties lack diversity. See *American National Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992).

[7] **Crowell v. Benson**
285 U.S. 22 (1932)

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

[1] This suit was brought in the District Court to enjoin the enforcement of an award made by petitioner Crowell, as Deputy Commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act [of March 4, 1927], and rested upon the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States.

[2] [Editor's new paragraph.] The complainant alleged that the award was contrary to law for the reason that Kundsen was not at the time of his injury an employee of the complainant and his claim was not 'within the jurisdiction' of the Deputy Commissioner. An amended complaint charged that the act was unconstitutional upon the grounds that it violated the due process clause of the Fifth Amendment, the provision of the Seventh Amendment as to trial by jury[,] and the provisions of Article III with respect to the judicial power of the United States.

[3] [Editor's new paragragh.] The District Judge denied motions to dismiss and granted a hearing *de novo* upon the facts and the law, expressing the opinion that the act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and, the evidence of both parties having been heard, the District Court decided that Knudsen was not in the employ of the petitioner and restrained the enforcement of the award. The decree was affirmed by the Circuit Court of Appeals and this Court granted writs of certiorari.

* * *

[4] *First.* The act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" if recovery "through workmen's compensation proceedings may not validly be provided by State law," and it applies only when the relation of master and servant exists. . . . . Employers are made liable for the payment to their employees of prescribed compensation "irrespective of fault as a cause for the injury." The liability is exclusive, unless the employer fails to secure payment of the compensation. . . . .

* * *

[5] *Second.* The objections to the procedural requirements of the act relate to the extent of the administrative authority which it confers. The administration of the act . . . . was given to the United States Employees' Compensation Commission, which was authorized to establish

compensation districts, appoint deputy commissioners, and make regulations. A claim for compensation must be filed with the deputy commissioner within a prescribed period, and it is provided that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim. . . . . In conducting investigations and hearings, the deputy commissioner is not bound by common law or statutory rules of evidence, or by technical or formal rules or procedure, except as the act provides, but he is to proceed in such manner "as to best ascertain the rights of the parties." He may issue subpoenas, administer oaths, compel the attendance and testimony of witnesses, the production of documents or other evidence or the taking of depositions, and may do all things conformable to law which may be necessary to enable him effectively to discharge his duties. Proceedings may be brought before the appropriate federal court to punish for misbehavior or contumacy as in case of contempt. . . . . A compensation order becomes effective when filed, and, unless proceedings are instituted to suspend it or set it aside it becomes final at the expiration of thirty days. . . . .

[6] The Act further provides that, if a compensation order is "not in accordance with law," it "may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest" against the deputy commissioner making the order and instituted in the federal District Court for the judicial district in which the injury occurred. . . . . Beneficiaries of awards or the deputy commissioner may apply for enforcement to the federal District Court, and, if the court determines that the order "was made and served in accordance with law," obedience may be compelled by writ of injunction or other proper process.

[The Seventh Amendment]

[7] As the claims which are subject to the provisions of the act are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

[Due Process]

[8] (1) The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or to set aside a compensation order[,] and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served. Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. As

the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied.

[9] Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded. . . . . The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.

[The Judicial Power]

[10] (2) The contention based upon the judicial power of the United States, as extended 'to all Cases of admiralty and maritime Jurisdiction,' presents a distinct question. In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855), this Court, speaking through Mr. Justice Curtis, said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

[11] The question in the instant case, in this aspect, can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant. Nor is the provision for injunction proceedings open to objection. The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the act. By statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings. The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or "contrary

to the indisputable character of the evidence," or where the hearing is "inadequate," or "unfair," or arbitrary in any respect.

[12] As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in *Murray's Lessee v. Hoboken Land & Improvement Company*, pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Thus the Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.

[13] The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common-law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found. . . . .

* * *

[14] In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required. The statute has a limited application,

being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the act, is necessary to its effective enforcement. The act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

[15] (3) What has been said thus far relates to the determination of claims of employees within the purview of the act. A different question is presented where the determinations of fact are fundamental or "jurisdictional," in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly, but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

[16] In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases, regardless of particular circumstances or relations. . . . . In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment, and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

[17] In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. . . . . It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency — in this instance a single deputy commissioner — for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

* * *

[18] When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision that he "shall have full power and authority to hear and determine all questions in respect of such claim." But "such claim" is the claim for compensation under the act and by its explicit provisions is that of an "employee," as defined in the act, against his "employer." The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the federal court to set aside a compensation order if it is "not in accordance with law." In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. . . . .

* * *

[19] The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a

clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply, and that, for the reasons stated in the earlier part of this opinion, the determination of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the act provides.

* * *

[20] We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment. Upon that issue the witnesses who had testified before the deputy commissioner and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle. With respect to the facts, the two courts below are in accord, and we find no reason to disturb their decision.

Decree affirmed.

MR. JUSTICE BRANDEIS, dissenting.

[21] Knudsen filed a claim against Benson under . . . the Longshoremen's and Harbor Workers' Compensation Act. Benson's answer denied, among other things, that the relation of employer and employee existed between him and the claimant. The evidence introduced before the deputy commissioner, which occupies 78 pages of the printed record, was directed largely to that issue and was conflicting. The deputy commissioner found that the claimant was in Benson's employ at the time of the injury, and filed an order for compensation . . . . Benson brought this proceeding . . . to set aside the order. The District Judge transferred the suit to the admiralty side of the court and held a trial *de novo*, refusing to consider upon any aspect of the case the record before the deputy commissioner. On the evidence introduced in court, he found that the relation of employer and employee did not exist, and entered a decree setting aside the compensation order. The Circuit Court of Appeals affirmed the decree. This Court granted certiorari. In my opinion, the decree should be reversed, because Congress did not authorize a trial *de novo*.

* * *

[22] Whether the power of Congress to provide compensation for injuries occurring on navigable waters is limited to cases in which the employer employee relation exists has not heretofore been passed upon by this Court and was not argued in this case. I see no justification for assuming, under those circumstances, that it is so limited. Without doubt the word "employee" was used in the Longshoremen's Act in the sense in which the common law defines

it. But that definition is not immutable; and no provision of the Constitution confines the application of liability without fault to instances where the relation of employment, as so defined, exists. Whether an individual is an employer or an independent contractor depends upon criteria often subtle and uncertain of application, criteria which have been developed, by processes of judicial exclusion and inclusion, largely since the adoption of the Constitution and with reference, for the most part, to considerations foreign to industrial accident litigation. It is not to be assumed that Congress, having power to amend and revise the maritime law, is prevented from modifying those criteria and enlarging the liability imposed by this act so as to embrace all persons who are engaged or engage themselves in the work of another, including those now designated as independent contractors. In the Longshoremen's Act itself, Congress, far from declaring the relation of master and servant indispensable in all cases to the application of the statute, provided expressly that a contractor shall be liable to employees of a subcontractor who has failed to secure payment of compensation. . . . . I cannot doubt that, even upon the view of the evidence taken by the District Court, Congress might have made Benson liable to Knudsen for the injury which he sustained.

[23] . . . . Even if the constitutional power of Congress to provide compensation is limited to cases in which the employer employee relation exists, I see no basis for a contention that the denial of the right to a trial *de novo* upon the issue of employment is in any manner subversive of the independence of the federal judicial power. Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon the tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances. It does not depend upon the absolute existence in reality of any fact.

[24] It is true that, so far as Knudsen is concerned, proof of the existence of the employer employee relation is essential to recovery under the act. But . . . that fact is not jurisdictional. It is quasi-jurisdictional. The existence of a relation of employment is a question going to the applicability of the substantive law, not to the jurisdiction of the tribunal. Jurisdiction is the power to adjudicate between the parties concerning the subject-matter. Obviously, the deputy commissioner had not only the power but the duty to determine whether the employer-employee relation existed. When a duly constituted tribunal has jurisdiction of the parties and of the subject-matter, that jurisdiction is not impaired by errors, however grave, in applying the substantive law. This is true of tribunals of special as well as of those of general jurisdiction. It is true of administrative, as well as of judicial, tribunals. If errors in the application of law may not be made the basis of collateral attack upon the decision of an administrative tribunal, once

that decision has become final, no "jurisdictional" defect can compel the independent re-examination in court, upon direct review, of the facts affecting such applicability.

[25] The "judicial power" of article 3 of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that article nothing which requires any controversy to be determined as of first instance in the federal District Courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal District Courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. An accumulation of precedents, already referred to, has established that in civil proceedings involving property rights determination of facts may constitutionally be made otherwise than judicially; and necessarily that evidence as to such facts may be taken outside of a court. I do not conceive that article 3 has properly any bearing upon the question presented in this case.

* * *

[26] Whatever may be the propriety of the rule permitting special re-examination in a trial court of so-called 'jurisdictional facts' passed upon by administrative bodies having otherwise final jurisdiction over matters properly committed to them, I find no warrant for extending the doctrine to other and different administrative tribunals whose very function is to hear evidence and make initial determinations concerning those matters which it is sought to re-examine. Such a doctrine has never been applied to tribunals properly analogous to the deputy commissioners, such as the Interstate Commerce Commission, the Federal Trade Commission, the Secretary of Agriculture acting under the Packers and Stockyards Act and the like. Logically applied it would seriously impair the entire administrative process.

* * *

MR. JUSTICE STONE and MR. JUSTICE ROBERTS join in this opinion.

Notes on Crowell v. Benson

1. Note the key facts of this case. Knudsen said he was injured while in Crowell's employ. He took his claim to the United States Employees' Compensation Commission, a federal administrative agency, which held (per Benson) that Crowell was liable to Knudsen under the Longshoremen's and Harbor Workers' Compensation Act of 1927. See ¶ [1]. Note as well that the act did not require *scienter* for liability to apply. See ¶ [4] (noting that "[e]mployers are made liable for the payment to their employees of prescribed compensation 'irrespective of fault as a cause for the injury.'") The predicates for liability were: (1) injury (2) in the course of employment (3) on the navigable waters of the United States. In other words, this was a federal

version of workers' compensation. In previous cases, the Court had refused to let analogous state programs apply to such workers, on the ground that Congress had exclusive power to regulate accidents on the navigable waters of the United States. See *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), cited by the Court in a portion of the opinion that the editor has deleted.

3. *Whither the Seventh Amendment?* Crowell attacks the judgment against him on several grounds, including the ground that the proceedings before the Commission violated the Seventh Amendment, which provides in relevant part that, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." The Court makes short work of this argument. Because Knudsen's claim arose on the navigable waters of the United States, it sounded in admiralty, not law. See ¶ [7]. As Julius Caesar might have put the matter, all law is divided into three parts: law, equity, and admiralty.

4. *"Public rights"?* In ¶ [12], the Chief Justice refers to cases of "public rights." Such cases, he says, are "those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." In this realm, he writes, Congress has discretion to resolve matters on its own, or to vest their resolution in the executive branches. But is his definition too broad? Doesn't a criminal prosecution "arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"? And doesn't Congress have the function of defining crimes, and the executive of prosecuting them? If this is an absurd application of the Chief Justice's words — and surely it is — what exactly *does* he mean by this language?

After making the statement quoted above, the Chief Justice goes on to quote *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855), to describe the contours of "public rights," but query whether he is faithful to that case. *Murray's Lessee* was about a "distress" (a form of summary execution) by a federal executive official upon property belonging to a federal agent for a deficiency in funds he was supposed to have collected on behalf of the United States. Can *Murray's Lessee* comprehend all cases "which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," as the Chief Justice suggests? ¶ [12].

5. *A mere adjunct?* Chief Justice Hughes analogizes the Commission to a jury (in actions at law) or to a master, commissioner or assessor (in actions in equity or admiralty). See ¶ [13]. Is this apt? Granted, federal judges may not generally upset the factual findings of a jury, but they treat the recommendations of masters, etc., as merely advisory. That wasn't the posture with which federal judges were to receive factual findings by the deputy commissioners under the statute at issue in this case, was it? See ¶ [9] ("Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within

the scope of his authority, shall be final."). Has the Court sacrificed the principles of the Constitution on the altar of expediency, to put the matter in pejorative terms, or has it saved the republic from fastidious attachment to obsolete principles, to put the matter in equally (but opposite) pejorative terms? See (for one side) David P. Currie, The Constitution in the Supreme Court: The Second Century 1888-1986 at 215 (1990) (evaluating *Crowell*) ("[R]eview of questions of law [but not fact] was inadequate to protect the rights of the parties.").

However you answer the foregoing questions, please note that *Crowell v. Benson* is widely perceived, along with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), as the Declaration of Independence of the administrative state. Richard Fallons writes as follows:

> Since *Crowell*, the Supreme Court has consistently upheld administrative adjudication pursuant to what is termed "the agency model," which applies when agencies adjudicate disputes under their governing statutes, subject to appellate review in an Article III court.

Richard H. Fallon, Jr., Jurisdiction-Stripping Reconsidered, 96 Va. L. Rev. 1043, 1123 (2010). See also Paul M. Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 251 (1990) (describing *Crowell* as "the greatest of the cases validating administrative adjudication"). In fact, as Fallon observes, the parts of *Crowell* that *limited* the scope of administrative authority have receded in importance. "[S]ubsequent cases have eroded *Crowell*'s specifications concerning the Article III courts' necessary powers in cases of agency adjudication of what the *Crowell* Court called a 'private right' . . . . The category of 'jurisdictional fact' now has little significance." *Id.* (footnotes omitted). Viewed in hindsight, was *Crowell* simply part of an orderly retreat by the Court from the overwhelming practical force of the administrative state?

6. *Confusing categories?* Why was the existence of an employment relationship between Crowell and Knudsen a "constitutional" or "jurisdictional" fact, whereas whether Knudsen had been injured was not? See ¶ [19]. Does some bright line separate the two concepts? Whether the water was navigable may be clear enough. After all, Congress could not generally regulate employment relationships in 1932, when this case was decided. But what made the *relationship* between the two individuals special? According to Justice Brandeis, nothing did. See ¶ [22]. The Chief Justice appears to be saying that Congress may only constitutionally make Benson liable, in the absence of fault, if Knudsen was his employee. By similar logic, why couldn't the Chief Justice say that Congress may only constitutionally make Benson liable if Knudsen in fact sustained an injury?

In any case, the requirement of *de novo* review of "constitutional facts" barely outlived *Crowell*, being rejected by the Court only four years later in *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936). See Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939, 977 (2011). The concept of constitutional facts continues to retain validity in other contexts,

however. For example, courts have authority to make an independent examination of the facts in many cases implicating the First Amendment. See, *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way."); *id.* ("We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.").

7. *Greater includes the lesser?* In ¶ [23], dissenting Justice Brandeis gives us another example of the argument that "the greater power includes the lesser," which we saw in *Lincoln Mills*. "The power of Congress to provide by legislation for liability under certain circumstances," he writes, "subsumes the power to provide for the determination of the existence of those circumstances." In other words, if Congress defines a liability, it may also establish a non-Article III tribunal to adjudicate whether that liability exists. Although he acknowledges that such tribunals must afford due process, he does not see Article-III courts as having a mandatory role, at least not at the fact-finding stage. See ¶ [25]. To a very large extent, the administrative world of today reflects Justice Brandeis' vision.

[8] Northern Pipeline Construction Co. v. Marathon Pipe Line Co.
458 U.S. 50 (1982)

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

[1] The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted . . . by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution.

I

A

* * *

[2] Before the Act, federal district courts served as bankruptcy courts and employed a "referee" system. Bankruptcy proceedings were generally conducted before referees, except in those instances in which the district court elected to withdraw a case from a referee. The referee's final order was appealable to the district court. The bankruptcy courts were vested with "summary jurisdiction" — that is, with jurisdiction over controversies involving property in the actual or constructive possession of the court. And, with consent, the bankruptcy court also had jurisdiction over some "plenary" matters — such as disputes involving property in the possession of a third person.

[3] The Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." The judges of these courts are appointed to office for 14-year terms by the President, with the advice and consent of the Senate. They are subject to removal by the "judicial council of the circuit" on account of "incompetency, misconduct, neglect of duty or physical or mental disability." In addition, the salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act.

[4] The jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system. Eliminating the distinction between "summary" and "plenary" jurisdiction, the Act grants the new courts jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11." (Emphasis added.) This jurisdictional grant empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under Title 11. Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of

the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law.

* * *

[5] The Act also establishes a special procedure for appeals from orders of bankruptcy courts. The circuit council is empowered to direct the chief judge of the circuit to designate panels of three bankruptcy judges to hear appeals. These panels have jurisdiction of all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. The court of appeals is given jurisdiction over appeals from the appellate panels or from the district court. If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a bankruptcy court.[5]

* * *

B

[6] This case arises out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Co. filed a petition for reorganization in January 1980. In March 1980 Northern, pursuant to the Act, filed in that court a suit against appellee Marathon Pipe Line Co. Appellant sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress. Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The United States intervened to defend the validity of the statute.

[7] The Bankruptcy Judge denied the motion to dismiss. But on appeal the District Court entered an order granting the motion, on the ground that "the delegation of authority . . . to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges" was unconstitutional. Both the United States and Northern filed notices of appeal in this Court. We noted probable jurisdiction.

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[5]Although no particular standard of review is specified in the Act, the parties in the present cases seem to agree that the appropriate one is the clearly-erroneous standard, employed in old Bankruptcy Rule 810 for review of findings of fact made by a referee.

II

A

* * *

[8] The Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature — to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. Hamilton explained the importance of an independent Judiciary:

> Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78.

* * *

[9] As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Art. III, § 1.

* * *

B

[10] It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetency, misconduct, neglect of duty, or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges.

* * *

[11] Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends." Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in 'specialized areas having particularized needs and warranting distinctive treatment,'" such as the area of bankruptcy law. (Quoting *Palmore v. United States*, 411 U.S. 389, 408 (1973).) Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bankruptcy jurisdiction was vested in the district court" of the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court." Analogizing the role of the bankruptcy court to that of a special master, appellants urge us to conclude that this "adjunct" system established by Congress satisfies the requirements of Art. III. We consider these arguments in turn.

III

[12] Congress did not constitute the bankruptcy courts as legislative courts. Appellants contend, however, that the bankruptcy courts could have been so constituted, and that as a result the "adjunct" system in fact chosen by Congress does not impermissibly encroach upon the judicial power. In advancing this argument, appellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III courts], as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts.[15] Rather, they reduce to three narrow situations not subject to that

[15] JUSTICE WHITE's dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. But, of course, virtually all matters that

command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

[13] Appellants first rely upon a series of cases in which this Court has upheld the creation by Congress of non-Art. III "territorial courts." This exception from the general prescription of Art. III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. For example, in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), the Court observed that Art. IV bestowed upon Congress alone a complete power of government over territories not within the States that constituted the United States. The Court then acknowledged Congress' authority to create courts for those territories that were not in conformity with Art. III. . . . .

[14] The Court followed the same reasoning when it reviewed Congress' creation of non-Art. III courts in the District of Columbia. It noted that there was in the District "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838).[16]

[15] Appellants next advert to a second class of cases — those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts-martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too involves a constitutional grant of power that has been historically

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might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state-court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges. The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. But the Framers did not leave it to Congress to define the character of those courts — they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

[16]We recently reaffirmed the principle, expressed in these early cases, that Art. I, § 8, cl. 17, provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. *Palmore v. United States*, 411 U.S. at 397.

understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue. Article I, § 8, cls. 13, 14, confer upon Congress the power "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for "cases arising in the land or naval forces." And Art. II, § 2, cl. 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Noting these constitutional directives, the Court in *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857), explained:

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

Id. at 79.

[16] Finally, appellants rely on a third group of cases, in which this Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[18] The "public rights" doctrine was first set forth in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856):

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id. at 284 (emphasis added).

[17] This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See *id.* at 283-85; see also *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929). But

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[18]Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. See, *e.g.*, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977).

the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell v. Benson*, 285 U.S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see *Ex parte Bakelite Corp.*, 279 U.S. at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. *Crowell v. Benson*, 285 U.S. at 50.

[18] The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial." *Ex parte Bakelite Corp.*, 279 U.S. at 458. For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.[20] On the same premise, the Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court:

> The *full* province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws . . . . The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of *which may be, and at times has been, committed exclusively to executive officers*.

279 U.S. at 458 (emphasis added).

[19] The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and

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[20]Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

others." *Ex parte Bakelite Corp.*, 279 U.S. at 451.[23] In contrast, "the liability of one individual to another under the law as defined," *Crowell v. Benson*, 285 U.S. at 51, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, n.7 (1977); *Crowell v. Benson*, 285 U.S. at 50-51.[24] Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

[20] In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.[25]

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[23]Congress cannot "withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (emphasis added). It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." . . . . Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. at 455, n.13.

[24]Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party.

[25]The "unifying principle" that JUSTICE WHITE's dissent finds lacking in all of these cases is to be found in the exceptional constitutional grants of power to Congress with respect to certain matters. Although the dissent is correct that these grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. When these three exceptional grants are properly constrained, they do not threaten the Framers' vision of an independent Federal Judiciary. What clearly remains subject to Art. III are all private adjudications in federal courts within the States — matters from their nature subject to "a suit at common law or in equity or admiralty" — and all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Art. III Branch, these matters lay at what they perceived to be the protected core of that power. Although the dissent recognizes that the Framers had something important in mind when they assigned the judicial power of the United States to Art. III courts, it concludes that our cases and subsequent practice have eroded this conception. Unable to find a satisfactory theme in our precedents for analyzing these cases, the dissent rejects all of them, as well as the historical understanding upon which they were based, in favor of an ad hoc balancing approach in which Congress can essentially determine for itself

[21] We discern no such exceptional grant of power applicable in the cases before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U.S. at 51.[26]

[22] Recognizing that the present cases may not fall within the scope of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy-related controversies." In support of this argument, appellants rely primarily upon a quotation from the opinion in *Palmore v. United States*, 411 U.S. 389 (1973), in which we stated that

> both Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.

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whether Art. III courts are required. But even the dissent recognizes that the notion that Congress rather than the Constitution should determine whether there is a need for independent federal courts cannot be what the Framers had in mind.

[26]This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization. See *Williams v. Austrian*, 331 U.S. 642 (1947); *Schumacher v. Beeler*, 293 U.S. 367 (1934). See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting). But this relationship does not transform the state-created right into a matter between the Government and the petitioner for reorganization. Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.

Id. 407-08. Appellants cite this language to support their proposition that a bankruptcy court created by Congress under its Art. I powers is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment."

[23] Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases. See, *e.g.*, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. at 450, n.7. Although the cases relied upon by appellants demonstrate that independent courts are not required for *all* federal adjudications, those cases also make it clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it. See, *e.g.*, *Ex parte Bakelite Corp.*, 279 U.S. at 449; *American Ins. Co. v. Canter*, 26 U.S. at 546; *Murray's Lessee*, 59 U.S. at 284. *Cf. Crowell v. Benson*, 285 U.S. at 51.

[24] The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts. True, appellants argue that under their analysis Congress could create legislative courts pursuant only to some "specific" Art. I power, and "only when there is a particularized need for distinctive treatment." They therefore assert that their analysis would not permit Congress to replace the independent Art. III Judiciary through a "wholesale assignment of federal judicial business to legislative courts." But these "limitations" are wholly illusory. For example, Art. I, § 8, empowers Congress to enact laws, *inter alia*, regulating interstate commerce and punishing certain crimes. Art. I, § 8, cls. 3, 6. On appellants' reasoning Congress could provide for the adjudication of these and "related" matters by judges and courts within Congress' exclusive control. The potential for encroachment upon powers reserved to the Judicial Branch through the device of "specialized" legislative courts is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us. The broad range of questions that can be brought into a bankruptcy court because they are "related to cases under title 11" is the clearest proof that even when Congress acts through a "specialized" court, and pursuant to only one of its many Art. I powers, appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political Branches. In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.[28]

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[28]JUSTICE WHITE's suggested "limitations" on Congress' power to create Art. I courts are even more transparent. JUSTICE WHITE's dissent suggests that Art. III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities," and that the Court retains the final word on how the balance is to be struck. The dissent would find the Art. III "value" accommodated where appellate review by Art. III courts is provided and where the Art. I courts are "designed to deal with issues likely to

[25] Appellants' reliance upon *Palmore* for such broad legislative discretion is misplaced. In the context of the issue decided in that case, the language quoted from the *Palmore* opinion offers no substantial support for appellants' argument. *Palmore* was concerned with the courts of the District of Columbia, a unique federal enclave over which "Congress has . . . entire control . . . for every purpose of government." *Kendall v. United States*, 37 U.S. at 619. The "plenary authority" under the District of Columbia Clause, Art. I, § 8, cl. 17, was the subject of the quoted passage and the powers granted under that Clause are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative. This is a power that is clearly possessed by Congress only in limited geographic areas. *Palmore* itself makes this limitation clear. The quoted passage distinguishes the congressional powers at issue in *Palmore* from those in which the Art. III command of an independent Judiciary must be honored: where "laws of national applicability and affairs of national concern are at stake." 411 U.S. at 408. Laws respecting bankruptcy, like most laws enacted pursuant to the national powers cataloged in Art. I, § 8, are clearly laws of national applicability and affairs of national concern. Thus our reference in *Palmore* to "specialized areas having particularized needs" referred only to *geographic* areas, such as the District of Columbia or territories outside the States of the Federal Union. In light of the clear commands of Art. III, nothing held or said in *Palmore* can be taken to mean that in every area in which Congress may legislate, it may also create non-Art. III courts with Art. III powers.

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IV

[26] Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. As support for their argument, appellants rely principally upon *Crowell v. Benson*, 285 U.S. 22 (1932), and *United States v.*

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be of little interest to the political branches." But the dissent's view that appellate review is sufficient to satisfy either the command or the purpose of Art. III is incorrect. And the suggestion that we should consider whether the Art. I courts are designed to deal with issues likely to be of interest to the political Branches would undermine the validity of the adjudications performed by most of the administrative agencies, on which validity the dissent so heavily relies. In applying its ad hoc balancing approach to the facts of this case, the dissent rests on the justification that these courts differ from standard Art. III courts because of their "extreme specialization." As noted above, "extreme specialization" is hardly an accurate description of bankruptcy courts designed to adjudicate the entire range of federal and state controversies. Moreover, the special nature of bankruptcy adjudications is in no sense incompatible with performance of such functions in a tribunal afforded the protection of Art. III. . . . .

Raddatz, 447 U.S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts. The question to which we turn, therefore, is whether the Act has retained "the essential attributes of the judicial power," *Crowell v. Benson*, 285 U.S. at 51, in Art. III tribunals.

[27] The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the power to adjudicate "private rights" must be vested in an Art. III court,

> this Court has accepted factfinding by an administrative agency[,] as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master.

Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. at 450, n.7 (citing *Crowell v. Benson*, 285 U.S. at 51-65).

[28] The use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson*. The congressional scheme challenged in *Crowell* empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Court began its analysis by noting that the federal statute administered by the Compensation Commission provided for compensation of injured employees "irrespective of fault," and that the statute also prescribed a fixed and mandatory schedule of compensation. The agency was thus left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record. The Court found that in view of these limitations upon the Compensation Commission's functions and powers, its determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." *Id.* at 54. Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," *id.* at 51, the Court held that Art. III imposed no bar to the scheme enacted by Congress, *id.* at 54.

[29] *Crowell* involved the adjudication of congressionally created rights. But this Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights — so long as those adjuncts were subject to sufficient control by an Art. III district court. In *United States v. Raddatz*, 447 U.S. 667, the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions

based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence. Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. Under these circumstances, the Court held that the Act did not violate the constraints of Art. III.

[30] Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers. First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated — including the assignment to an adjunct of some functions historically performed by judges.[32] Thus *Crowell* recognized that Art. III does not require "all determinations of fact [to] be made by judges," 285 U.S. at 51; with respect to congressionally created rights, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar, *id.* at 54. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme challenged in *Crowell*, the Court emphasized that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Id.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz*, the Court stressed that under the congressional scheme "[t]he authority — and the responsibility — to make an informed, final determination . . . remains with the judge," 447 U.S. at 682; the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U.S. at 683.

[31] These two principles assist us in evaluating the "adjunct" scheme presented in these cases. Appellants assume that Congress' power to create "adjuncts" to consider all cases related to those arising under Title 11 is as great as it was in the circumstances of *Crowell*. But while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants' argument — that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress. Indeed,

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[32]Contrary to JUSTICE WHITE's suggestion, we do not concede that "Congress may provide for initial adjudications by Art. I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." Rather we simply reaffirm the holding of *Crowell* — that Congress may assign to non-Art. III bodies some adjudicatory functions. *Crowell* itself spoke of "specialized" functions. These cases do not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.

the validity of this proposition was expressly denied in *Crowell*, when the Court rejected "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved," 285 U.S. at 60-61 (emphasis added), and stated that

> the essential independence of the exercise of the judicial power of the United States in the enforcement of *constitutional* rights requires that the Federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it.

Id. at 64 (emphasis added).[34]

[32] [Editor's new paragraph.] Appellants' proposition was also implicitly rejected in *Raddatz*. Congress' assignment of adjunct functions under the Federal Magistrates Act was substantially narrower than under the statute challenged in *Crowell*. Yet the Court's scrutiny of the adjunct scheme in *Raddatz* — which played a role in the adjudication of *constitutional* rights — was far stricter than it had been in *Crowell*. Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court.

[33] [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

[34] We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy

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[34] *Crowell*'s precise holding, with respect to the review of "jurisdictional" and "constitutional" facts that arise within ordinary administrative proceedings, has been undermined by later cases. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936). But the general principle of *Crowell* — distinguishing between congressionally created rights and constitutionally recognized rights — remains valid, as evidenced by the Court's recent approval of *Ng Fung Ho v. White*, 259 U.S. 276 (1922), on which *Crowell* relied. See *Agosto v. INS*, 436 U.S. 748, 753 (1978) (*de novo* judicial determination required for claims of American citizenship in deportation proceedings). See also *United States v. Raddatz*, 447 U.S. at 682-84; *id.* at 707-12 (MARSHALL, J., dissenting).

courts, like the rights implicated in *Raddatz*, are not of Congress' creation. Indeed, the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court.[36] Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over Northern's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

[35] Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." 28 U.S.C. § 1471(b) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts, § 1471(c) (emphasis added). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, the power to issue declaratory judgments, the power to issue writs of habeas corpus, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11. Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. See n.5, *supra*. Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal. In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.

[36] We conclude that . . . § 241(a) . . . has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those

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[36]Of course, bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law. Appellant Northern's state-law contract claim is now in federal court because of its relationship to Northern's reorganization petition. But Congress has not purported to prescribe a rule of decision for the resolution of Northern's contractual claims.

attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

* * *

[37] The judgment of the District Court is affirmed. . . . .

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

[38] Were I to agree with the plurality that the question presented by these cases is "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in . . . by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution," I would with considerable reluctance embark on the duty of deciding this broad question. But appellee Marathon Pipe Line Co. has not been subjected to the full range of authority granted bankruptcy courts by [this provision]. . . . .

* * *

[39] From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common-law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court.

[40] The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), and *Palmore v. United States*, 411 U.S. 389 (1973), the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

[41] I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the bankruptcy court in a case such as Northern's does not save the

grant of authority to the latter under the rule espoused in *Crowell v. Benson*, 285 U.S. 22 (1932). All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated. Acting in this manner the bankruptcy court is not an "adjunct" of either the district court or the court of appeals.

[42] I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under [§ 241(a)], I concur in the judgment. I also agree with the discussion in Part V of the plurality opinion respecting retroactivity and the staying of the judgment of this Court.

CHIEF JUSTICE BURGER, dissenting.

[43] I join JUSTICE WHITE's dissenting opinion, but I write separately to emphasize that, notwithstanding the plurality opinion, the Court does not hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Art. III of the Constitution. Rather, the Court's holding is limited to the proposition stated by JUSTICE REHNQUIST in his concurrence in the judgment — that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Art. III court" if it is to be heard by any court or agency of the United States. This limited holding, of course, does not suggest that there is something inherently unconstitutional about the new bankruptcy courts; nor does it preclude such courts from adjudicating all but a relatively narrow category of claims "arising under" or "arising in or related to cases under" the Bankruptcy Act.

* * *

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

[44] Article III, § 1, of the Constitution is straightforward and uncomplicated on its face:

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

Any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial Power of the United States" and so must be manned by judges possessing

both life tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the plurality shows, is well founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure.

[45] If this simple reading were correct and we were free to disregard 150 years of history, these would be easy cases and the plurality opinion could end with its observation that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." The fact that the plurality must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law itself indicates the gross oversimplification implicit in the plurality's claim that "our Constitution unambiguously enunciates a fundamental principle — that the 'judicial Power of the United States' must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence." While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

[46] That question is what limits Art. III places on Congress' ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered. In its attempt to pigeonhole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.

I

* * *

[47] [T]he distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings. The routine in ordinary bankruptcy cases now, as it was before 1978, is to stay actions against the bankrupt, collect the bankrupt's assets, require creditors to file claims or be forever barred, allow or disallow claims that are filed, adjudicate preferences and fraudulent transfers, and make pro rata distributions to creditors, who will be barred by the discharge from taking further actions against the bankrupt. The crucial point to be made is that in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy — claims for goods sold, wages, rent, utilities, and the like. . . . . Every such claim must be filed and its validity is subject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depend on state law. Hence, the bankruptcy judge is constantly enmeshed in state-law issues.

[48] The new aspect of the Bankruptcy Act of 1978, in this regard, therefore, is not the extension of federal jurisdiction to state-law claims, but its extension to particular kinds of state-law claims, such as contract cases against third parties or disputes involving property in the

possession of a third person.[4] Prior to 1978, a claim of a bankrupt against a third party, such as the claim against Marathon in this case, was not within the jurisdiction of the bankruptcy judge. The old limits were based, of course, on the restrictions implicit within the concept of *in rem* jurisdiction; the new extension is based on the concept of *in personam* jurisdiction. "The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H.R. Rep. No. 95-595 (1977). The difference between the new and old Acts, therefore, is not to be found in a distinction between state-law and federal-law matters; rather, it is in a distinction between *in rem* and *in personam* jurisdiction. The majority at no place explains why this distinction should have constitutional implications.

[49] [A]ll that can be left of the majority's argument in this regard is that state-law claims adjudicated within the federal system must be heard in the first instance by Art. III judges. [This proposal, however,] seems to turn the separation-of-powers doctrine, upon which the majority relies, on its head: Since state-law claims would ordinarily not be heard by Art. III judges — *i.e.*, they would be heard by state judges — one would think that there is little danger of a diminution of, or intrusion upon, the power of Art. III courts, when such claims are assigned to a non-Art. III court. The plurality misses this obvious point because it concentrates on explaining how it is that federally created rights can ever be adjudicated in Art. I courts — a far more difficult problem under the separation-of-powers doctrine. The plurality fumbles when it assumes that the rationale it develops to deal with the latter problem must also govern the former problem. In fact, the two are simply unrelated and the majority never really explains the separation-of-powers problem that would be created by assigning state-law questions to legislative courts or to adjuncts of Art. III courts.

* * *

II

[50] The plurality unpersuasively attempts to bolster its case for facial invalidity by asserting that the bankruptcy courts are now "exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*." In support of this proposition it makes five arguments in addition to the "state-law" issue. . . . .

[51] I also believe that the major premise of the plurality's argument is wholly unsupported: There is no explanation of why *Crowell v. Benson*, 285 U.S. 22 (1932), and *United States v. Raddatz*, 447 U.S. 667 (1980), define the outer limits of constitutional authority. Much more relevant to today's decision are, first, the practice in bankruptcy prior to 1978, which

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[4]Even this is not entirely new. Under the old Act, in certain circumstances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another. In *Katchen v. Landy*, 382 U.S. 323 (1966), for example, we recognized that when a creditor files a claim, the referee is empowered to hear and decide a counterclaim against that creditor arising out of the same transaction. . . . .

neither the majority nor any authoritative case has questioned, and, second, the practice of today's administrative agencies. Considered from this perspective, all of the plurality's arguments are unsupportable abstractions, divorced from the realities of modern practice.

[52] The first three arguments offered by the plurality focus on the narrowly defined task and authority of the agency considered in *Crowell*: The agency made only "specialized, narrowly confined factual determinations" and could issue only a narrow class of orders. Regardless of whether this was true of the Compensation Board at issue in *Crowell*, it certainly was not true of the old bankruptcy courts, nor does it even vaguely resemble current administrative practice. As I have already said, general references to bankruptcy judges, which was the usual practice prior to 1978, permitted bankruptcy judges to perform almost all of the functions of a bankruptcy court. . . . .

* * *

[53] The plurality's fourth argument fails to point to any difference between the new and old Bankruptcy Acts. While the administrative orders in *Crowell* may have been set aside by a court if "not supported by the evidence," under both the new and old Acts at issue here, orders of the bankruptcy judge are reviewed under the "clearly-erroneous standard." Indeed, judicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies. Generally courts are not free to set aside the findings of administrative agencies, if supported by substantial evidence. But more importantly, courts are also admonished to give substantial deference to the agency's interpretation of the statute it is enforcing. No such deference is required with respect to decisions on the law made by bankruptcy judges.

[54] Finally, the plurality suggests that, unlike the agency considered in *Crowell*, the orders of a post-1978 bankruptcy judge are final and binding even though not appealed. To attribute any constitutional significance to this, unless the plurality intends to throw into question a large body of administrative law, is strange. More directly, this simply does not represent any change in bankruptcy practice. It was hornbook law prior to 1978 that the authorized judgments and orders of referees, including turnover orders, were final and binding and res judicata unless appealed and overturned . . . .

[55] Even if there are specific powers now vested in bankruptcy judges that should be performed by Art. III judges, the great bulk of their functions are unexceptionable and should be left intact. Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can account for the majority's inexplicably heavy hand in this case only by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult problem of the nature and role of Art. I courts. To that question I now turn.

III

A

[56] The plurality contends that the precedents upholding Art. I courts can be reduced to three categories. First, there are territorial courts, which need not satisfy Art. III constraints because "the Framers intended that as to certain geographical areas . . . Congress was to exercise the general powers of government." Second, there are courts-martial, which are exempt from Art. III limits because of a constitutional grant of power that has been "historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights — controversies between the Government and private parties — which are not covered by Art. III because the controversy could have been resolved by the executive alone without judicial review. Despite the plurality's attempt to cabin the domain of Art. I courts, it is quite unrealistic to consider these to be only three "narrow" limitations on or exceptions to the reach of Art. III. In fact, the plurality itself breaks the mold in its discussion of "adjuncts" in Part IV, when it announces that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." Adjudications of federal rights may, according to the plurality, be committed to administrative agencies, as long as provision is made for judicial review.

[57] The first principle introduced by the plurality is geographical: Art. I courts presumably are not permitted within the States. The problem, of course, is that both of the other exceptions recognize that Art. I courts can indeed operate within the States. The second category relies upon a new principle: Art. I courts are permissible in areas in which the Constitution grants Congress "extraordinary control over the precise subject matter." Preliminarily, I do not know how we are to distinguish those areas in which Congress' control is "extraordinary" from those in which it is not. Congress' power over the Armed Forces is established in Art. I, § 8, cls. 13, 14. There is nothing in those Clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy. But more importantly, in its third category, and in its treatment of "adjuncts," the plurality itself recognizes that Congress can create Art. I courts in virtually all the areas in which Congress is authorized to act, regardless of the quality of the constitutional grant of authority. At the same time, territorial courts or the courts of the District of Columbia, which are Art. I courts, adjudicate private, just as much as public or federal, rights.

[58] Instead of telling us what it is Art. I courts can and cannot do, the plurality presents us with a list of Art. I courts. When we try to distinguish those courts from their Art. III counterparts, we find — apart from the obvious lack of Art. III judges — a series of nondistinctions. By the plurality's own admission, Art. I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions in those areas in which congressional control is

"extraordinary." I cannot distinguish this last category from the general "arising under" jurisdiction of Art. III courts.

[59] The plurality opinion has the appearance of limiting Art. I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Art. I courts or adjuncts to Art. III courts. But we need to know why bankruptcy courts cannot qualify as Art. I courts in their own right.

B

[60] The plurality opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Art. I from Art. III courts. The concept of a legislative, or Art. I, court was introduced by an opinion authored by Chief Justice Marshall. Not only did he create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept:

> The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). The proposition was simple enough: Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot.

[61] There were only two problems with this proposition. First, *Canter* itself involved a case in admiralty jurisdiction, which is specifically included within the "judicial power of the United States" delineated in Art. III. How, then, could the territorial court not be exercising Art. III judicial power? Second, and no less troubling, if the territorial courts could not exercise Art. III power, how could their decisions be subject to appellate review in Art. III courts, including this one, that can exercise only Art. III "judicial" power? Yet from early on this Court has exercised such appellate jurisdiction. The attempt to understand the seemingly unexplainable

was bound to generate "confusion and controversy." This analytic framework, however — the search for a principled distinction — has continued to burden the Court.

* * *

IV

[62] The complicated and contradictory history of the issue before us leads me to conclude that [t]here is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of our precedents upholding a variety of Art. I courts — not to speak of those Art. I courts that go by the contemporary name of "administrative agencies" — this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in The Federalist Nos. 78-82.

[63] To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Art. I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Art. I, rather than Art. III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

* * *

[64] To be more concrete: *Crowell* suggests that the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state-court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

[65] Similarly, as long as the proposed Art. I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction . . . for the purpose of emasculating" constitutional courts. *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949).

V

* * *

[66] For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

Notes on Northern Pipeline

1. Do you understand how bankruptcy worked before 1978? As Justice Brennan notes, bankruptcy judges acted as "referees" before then. See ¶ [2]. What does this mean? Was a bankruptcy judge like a special master, appointed by a judge to take on especially vexing cases? Ordinarily, a master simply submits proposed "findings of fact and conclusions of law" to the court, which the judge adopts or rejects. But a bankruptcy judge's decisions before 1978 had more finality than that. According to Justice Brennan, a bankruptcy judge's "final order was *appealable* to the district court." ¶ [2] (emphasis added). This suggests at least some degree of deference by the district court toward the referee. In fact, district courts did defer to a bankruptcy judge's findings of fact before 1978. See ¶ [5] n.5 (noting that district courts abided by these findings before 1978 unless they were clearly erroneous). If this is true, how different was the system Congress established in 1978? Were bankruptcy "referees" less powerful before 1978 than bankruptcy "judges" were afterward? If not, did § 241(a)'s infirmity lie not in the amount of *deference* at issue, but in the scope of the bankruptcy judge's *authority*, which now included the authority to adjudicate claims between the bankrupt and entities that had not themselves submitted a claim in bankruptcy, such as Marathon? (See the next note for more on this.)

2. Note the distinction Congress drew before 1978 between a referee's "summary" and "plenary" jurisdictions. "[C]ontroversies involving property in the actual or constructive possession of the court," writes Justice Brennan, fell into a referee's "summary" jurisdiction, whereas certain other matters, such as "disputes involving property in the possession of a third person," fell into a referee's "plenary" jurisdiction, if the parties gave their consent. ¶ [2]. As Justice White observes in his dissent, the distinction these two forms of jurisdiction reflected the ancient concept of *in rem* jurisdiction. See ¶ [48]. That is, because the court had jurisdiction over "the thing" of the bankrupt estate, it could entertain all claims involving the actual or constructive assets of that estate. You may have pleasant memories of *quasi-in rem* jurisdiction from Civil Procedure. See *Pennoyer v. Neff*, 95 U.S. 714 (1878).

3. What changes did Congress make in 1978? For purposes of *Northern Pipeline*, the key change was the enhancement of bankruptcy jurisdiction. Now, instead of hearing "summary" and "plenary" cases, bankruptcy courts could hear matters "*arising under* title 11," matters "*arising in . . . cases under* title 11," and matters "*related to cases under* title 11." ¶ [4] (quoting 28 U.S.C. § 1471(b) (emphasis added). As Justice White explains in his dissent, one goal of this legislation was to overcome the limits of *in rem* jurisdiction and allow bankruptcy courts to exercise *in personam* jurisdiction over a case like Northern's action for breach against

Marathon, even where the counter-party (*e.g.*, Marathon) had not submitted a claim against the bankrupt (*e.g.*, Northern) in the bankruptcy court. See ¶ [48].

4. Note the pertinent facts of the case. Northern was the bankrupt. It had ordinary common-law claims against Marathon when it went into reorganization — breach of contract and breach of warranty, which sounded in contract, and misrepresentation, coercion and duress, which sounded in tort. See ¶ [6]. Assuming Northern and Marathon were not diverse and Northern were not in bankruptcy, in what court would these actions have proceeded?

5. As you can see, the bankruptcy judge in this case denied Marathon's motion to dismiss on constitutional grounds, whereas the district judge accepted the same argument on appeal. See ¶ [7]. What do the principles of law and economics — or "public choice" — say about this?

6. In ¶ [8], Justice Brennan emphasizes the importance of an independent judiciary. The implication is that judges who do not serve for life with protected salary — like bankruptcy judges under the act of 1978 — are not truly independent, and therefore cannot be relied upon to follow only the law. Fair enough (maybe), but couldn't Congress have left cases like Northern's action against Marathon for breach to *state court*, and don't many state judges have to *run* for re-election? What values would re-allocating cases from non-Article-III tribunals to state courts serve? On what ground, if any, could we say that state judges are more insulated from the political process than bankruptcy judges? Justice Brennan responds to this point by suggesting that, although the Framers were anxious enough about the independence of federal judges to build protections into the Constitution, they were willing to allow Congress to control the line between federal and state jurisdiction. See ¶ [12] n.15. See also David P. Currie, The Constitution in the Supreme Court: The Second Century 1888-1986 at 216 n.56 (1990) ("State judges . . . are not subject to the congressional and presidential pressures that prompted adoption of the tenure and salary requirements, and allowing them to decide federal cases serves independent goals of federalism that are absent in the case of federal administrative agencies."). Is this persuasive?

7. Do you agree that Congress may establish courts that do not conform to the requirements of Article III for the territories and for the District of Columbia? Are *Canter* and *Kendall* correct? See ¶¶ [13]-[14]. Cases like *Canter* and *Kendall* are typically justified on the ground that Congress is the only government for the area in question, and therefore should have powers congruent to those of a state. Do you find this argument persuasive, or would you instead conclude that Article III, not Article I, § 8, cl. [17] (the "D.C. Clause"), or Article IV, § 3, cl. [2] (the "Property Clause"), should control?

And how about the military? Justice Brennan indicates in *Northern Pipeline* that Congress may establish courts-martial outside the strictures of Article III because of the plenary nature of Congress' power to regulate the military, and because of the long history of distinct military jurisdiction. See ¶ [15] (discussing *Dynes v. Hoover*). Does this prove too much? If

plenary authority and history are enough to justify an exception to Article III for the military, why aren't they enough for bankruptcy? Is the history different? Is Congress' authority over bankruptcy somehow less plenary than its authority over the military?

Given the foregoing, is Justice White correct in arguing that Justice Brennan has simply drawn a line in the sand, requiring *this case* to be heard in an Article-III court, but providing no principled explanation for why *this case* is different from *Canter*, *Kendall*, or *Dynes*?

> The plurality opinion [he writes] has the appearance of limiting Art. I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Art. I courts or adjuncts to Art. III courts. But we need to know why bankruptcy courts cannot qualify as Art. I courts in their own right.

¶ [59] (White, J., dissenting). If Justice White is correct, what prevents Congress from re-allocating adjudication from the Article-III courts to Article-I courts whenever it wants? The limits of the political system? Are they going to be sufficient to protect the kind of people who ordinarily would seek protection from the judiciary? Is Justice Brennan correct in arguing that Justice White's approach "provides no limiting principle"? ¶ [24]. Can courts make principled distinctions between acts of Congress that simply "go too far" and those that do not? On the other hand, doesn't Justice Brennan make subtle distinctions of his own? Consider the following criticism that Justice White sets forth in his dissent:

> Preliminarily, I do not know how we are to distinguish those areas in which Congress' control is "extraordinary" from those in which it is not. Congress' power over the Armed Forces is established in Art. I, § 8, cls. 13, 14. There is nothing in those Clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy.

¶ [57].

8. At ¶ [16], Justice Brennan addresses "public rights." What is Justice Brennan's understanding of this concept? At one point, he suggests that it is simply a function of sovereign immunity and other "prerogatives . . . reserved to the political Branches of Government." ¶ [17]. As a historical matter, these included decisions about the disposition of public lands, certain decisions about customs and immigration, decisions about the extent to which the government would allow itself to be sued, and similar matters over which the political branches were thought to have essentially free rein. See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559 (2007). But the concept of "public rights" appears to have gone well beyond this base by the time of *Northern Pipeline*. (We saw intimations of this in *Crowell v. Benson*.)

Atlas Roofing, which Justice Brennan cites more than once — and to which he does not appear to object — arose from an administrative proceeding in which OSHA imposed a fine on Atlas Roofing for a regulatory infraction. To be sure, the United States was a *party* to the case, in the form of OSHA, but query whether imposing monetary liability for such a violation is a matter "reserved to the political Branches of Government." As a conceptual matter, it was much like a criminal prosecution. Why was that a case about "public rights"? As Nelson observes:

> Historically, only "judicial" power could authoritatively determine individualized adjudicative facts in a way that bound core private rights; if core private rights were at stake on one side of the dispute, the mere fact that public rights were at stake on the other side did not open the door to nonjudicial adjudication. Indeed, that is precisely the structure of the standard criminal case — the paradigmatic example of a dispute that requires fully "judicial" determination.

107 Colum. L. Rev. at 604-05.

And, if *Atlas Roofing* was a case about "public rights," why couldn't *Northern Pipeline* be as well? Simply because private parties were on both sides of the dispute? Is this really true? Could one not say instead that the government, in the form of the trustee in bankruptcy, had stepped into the shoes of Northern (or Northern's creditors) in its action against Marathon? At one point in his plurality opinion, Justice Brennan reserves the question of whether the actual adjustment of claims against the bankrupt partake of "public rights." See ¶ [21]:

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.

Is this coherent? From the point of view of Northern and Northern's creditors, what's the difference between a *claim* against Marathon and any other asset Northern holds? Wouldn't any accountant put a value of Northern's unliquidated claims and add that value to the pot? On the other hand, why should a creditor's claim against a bankrupt estate be considered a matter of public right? To be sure, the *bankrupt* wants a discharge from liability, which could be classified as a "gift" from the government, but the *creditor* has a classic claim of private right and will almost certainly receive less than one hundred cents on the dollar in bankruptcy — not exactly a "gift" from the government. Of course, bankruptcy may enable some creditors to receive more than they would otherwise receive, because of the orderly nature of the process.

9. In his analysis of *Crowell v. Benson* and *Raddatz*, Justice Brennan puts a lot of emphasis on the fact that *Crowell* was about rights "created by Congress," ¶¶ [29]-[31], [33]-[34], whereas *Raddatz* was about constitutional rights — rights *not* created by Congress. His point is that Congress may authorize an entity other than an Article-III court to adjudicate rights

that it creates, at least to some extent, because it could have taken the more drastic step of not creating the right in the first place. You may recall that Justice Brandeis made this argument in *Crowell*. See *Crowell*, ¶ [23] (Brandeis, J., dissenting). But do these jurists see the matter in its full scope? Don't the "rights" at issue in a case like *Crowell* include the *defendant's* right to keep his property? And didn't that right exist *before* Congress enacted the statute? See generally Currie, The Second Century 595-96 (discussing *Crowell* in the context of *Northern Pipeline*).

10. What does Justice Brennan mean by ¶ [34] n.36? What if Congress *had* provided a rule of decision for Northern's action against Marathon for breach of contract? Could the case then qualify for *Crowell* and be resolved by a bankruptcy court? If so, why the fuss about taking the less drastic step of allowing *state law* to control in a bankruptcy court? Does Justice Brennan's approach put a premium on the distinct congressional step of actually *federalizing* a corner of the law of contracts — an unlikely development in our political system? What purpose would that serve? In any case, didn't *referees* in bankruptcy adjudicate cases on the basis of state law all the time before 1978, albeit not in the exact posture of Northern's action against Marathon? See ¶ [47] (White, J., dissenting).

11. As you know from *Tidewater*, at least five members of the Court must agree on the *disposition* of a case to render judgment. Therefore, Justice Brennan's plurality could not alone affirm the decision below. But then-Justice Rehnquist, joined by Justice O'Connor, agreed that the Court should affirm. Can there be a rationale for a fractured decision? "When a fragmented Court decides a case and no single rationale explaining the result [*i.e.*, disposition] enjoys the assent of five Justices," wrote Justice Powell in *Marks v. United States*, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). Under *Marks*, therefore, we would look to see where Justice Rehnquist agreed with Justice Brennan. See ¶¶ [39]-[42] (Rehnquist, J., concurring in the judgment). See also ¶ [43] (Burger, C.J., dissenting).

Compare this situation with the situation we confronted in *Tidewater*. In that case, there was no rationale common to the members of the Court who supported the disposition. Justice Jackson, joined by Justices Black and Burton, was willing to allow Article-III courts to perform non-Article-III business, at least in certain circumstances, but he was not willing to overrule *Hepburn & Dundas v. Ellzey*. Meanwhile, Justice Rutledge, joined by Justice Murphy, was *not* willing to allow Article-III courts to perform non-Article-III business, but he *was* willing to overrule *Hepburn & Dundas*. The only thing these five Justices could agree upon was the disposition of the case. Thus, the disposition hung in mid-air, without a supporting rationale. This is not the case with *Northern Pipeline*, as Justice Rehnquist, concurring in the judgment, was willing to embrace portions of Justice Brennan's plurality opinion.

12. For an examination of comparable issues under the Constitution of Kentucky, see *TECO Mechanical Contractor v. Comm'lth*, 366 S.W.3d 386, 398-99 (Ky. 2012) (discussing the General Assembly's authority to delegate judicial power to tribunals outside Ky. Const. § 109).

[9] **Commodity Futures Trading Commn v. Schor**
478 U.S. 833 (1986)

JUSTICE O'CONNOR delivered the opinion of the Court.

[1] The question presented is whether the Commodity Exchange Act empowers the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings and, if so, whether that grant of authority violates Article III of the Constitution.

I

[2] The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. In 1974, Congress "overhaul[ed]" the Act in order to institute a more "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." H.R. Rep. No. 93-975 (1974). Congress also determined that the broad regulatory powers of the CEA were most appropriately vested in an agency which would be relatively immune from the "political winds that sweep Washington." H.R. Rep. No. 93-975. It therefore created an independent agency, the CFTC, and entrusted to it sweeping authority to implement the CEA.

[3] Among the duties assigned to the CFTC was the administration of a reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers violations of the Act or CFTC regulations. Thus, § 14 of the CEA provides that any person injured by such violations may apply to the Commission for an order directing the offender to pay reparations to the complainant and may enforce that order in federal district court. Congress intended this administrative procedure to be an "inexpensive and expeditious" alternative to existing fora available to aggrieved customers, namely, the courts and arbitration. S. Rep. No. 95-850 (1978).

[4] In conformance with the congressional goal of promoting efficient dispute resolution, the CFTC promulgated a regulation in 1976 which allows it to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." This permissive counterclaim rule leaves the respondent in a reparations proceeding free to seek relief against the reparations complainant in other fora.

[5] The instant dispute arose in February 1980, when respondents Schor and Mortgage Services of America, Inc., invoked the CFTCs reparations jurisdiction by filing complaints against petitioner ContiCommodity Services, Inc., a commodity futures broker, and Richard L. Sandor, a Conti employee. Schor had an account with Conti which contained a debit balance because Schor's net futures trading losses and expenses, such as commissions, exceeded the funds deposited in the account. Schor alleged that this debit balance was the result of Conti's numerous violations of the CEA.

[6] Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in Federal District Court to recover the debit balance. Schor counterclaimed in this action, reiterating his charges that the debit balance was due to Conti's violations of the CEA. Schor also moved on two separate occasions to dismiss or stay the District Court action, arguing that the continuation of the federal action would be a waste of judicial resources and an undue burden on the litigants in view of the fact that "[t]he reparations proceedings . . . will fully . . . resolve and adjudicate all the rights of the parties to this action with respect to the transactions which are the subject matter of this action."

[7] Although the District Court declined to stay or dismiss the suit, Conti voluntarily dismissed the federal court action and presented its debit balance claim by way of a counterclaim in the CFTC reparations proceeding. Conti denied violating the CEA and instead insisted that the debit balance resulted from Schor's trading, and was therefore a simple debt owed by Schor.

[8] After discovery, briefing, and a hearing, the Administrative Law Judge in Schor's reparations proceeding ruled in Conti's favor on both Schor's claims and Conti's counterclaims. After this ruling, Schor for the first time challenged the CFTCs statutory authority to adjudicate Conti's counterclaim. The ALJ rejected Schor's challenge, stating himself "bound by agency regulations and published agency policies." The Commission declined to review the decision and allowed it to become final, at which point Schor filed a petition for review with the Court of Appeals for the District of Columbia Circuit. Prior to oral argument, the Court of Appeals, *sua sponte*, raised the question whether CFTC could constitutionally adjudicate Conti's counterclaims in light of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which this Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985).

[9] After briefing and argument, the Court of Appeals upheld the CFTC's decision on Schor's claim in most respects, but ordered the dismissal of Conti's counterclaims on the ground that "the CFTC lacks authority (subject matter competence) to adjudicate" common law counterclaims. In support of this latter ruling, the Court of Appeals reasoned that the CFTC's exercise of jurisdiction over Conti's common law counterclaim gave rise to "[s]erious constitutional problems" under *Northern Pipeline*. The Court of Appeals therefore concluded that, under well-established principles of statutory construction, the relevant inquiry was whether the CEA was "fairly susceptible of [an alternative] construction," such that Article III objections, and thus unnecessary constitutional adjudication, could be avoided.

[10] After examining the CEA and its legislative history, the court concluded that Congress had no "clearly expressed" or "explicit" intention to give the CFTC constitutionally questionable jurisdiction over state common law counterclaims. The Court of Appeals therefore "adopt[ed] the construction of the Act that avoids significant constitutional questions," reading

the CEA to authorize the CFTC to adjudicate only those counterclaims alleging violations of the Act or CFTC regulations. Because Conti's counterclaims did not allege such violations, the Court of Appeals held that the CFTC exceeded its authority in adjudicating those claims, and ordered that the ALJ's decision on the claims be reversed and the claims dismissed for lack of jurisdiction.

[11] The Court of Appeals denied rehearing en banc by a divided vote. . . . . This Court granted the CFTCs petition for certiorari, vacated the Court of Appeals judgment, and remanded the case for further consideration in light of *Thomas*, 473 U.S. 568 (1985). We had there ruled that the arbitration scheme established under the Federal Insecticide, Fungicide, and Rodenticide Act does not contravene Article III and, more generally, held that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." 473 U.S. at 593 .

[12] On remand, the Court of Appeals reinstated its prior judgment. It reaffirmed its earlier view that *Northern Pipeline* drew into serious question the Commission's authority to decide debit-balance counterclaims in reparations proceedings; concluded that nothing in *Thomas* altered that view; and again held that, in light of the constitutional problems posed by the CFTC's adjudication of common law counterclaims, the CEA should be construed to authorize the CFTC to adjudicate only counterclaims arising from violations of the Act or CFTC regulations.

[13] We again granted certiorari, and now reverse.

II

[14] The Court of Appeals was correct in its understanding that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Machinists v. Street*, 367 U.S. 740, 749 (1961). Where such "serious doubts" arise, a court should determine whether a construction of the statute is "fairly possible" by which the constitutional question can be avoided. *Crowell v. Benson*, 285 U.S. 22 (1932). It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)).

[15] Assuming that the Court of Appeals correctly discerned a "serious" constitutional problem in the CFTCs adjudication of Conti's counterclaim, we nevertheless believe that the court was mistaken in finding that the CEA could fairly be read to preclude the CFTC's exercise of jurisdiction over that counterclaim. Our examination of the CEA and its legislative history

and purpose reveals that Congress plainly intended the CFTC to decide counterclaims asserted by respondents in reparations proceedings, and just as plainly delegated to the CFTC the authority to fashion its counterclaim jurisdiction in the manner the CFTC determined necessary to further the purposes of the reparations program.

[16] Congress' assumption that the CFTC would have the authority to adjudicate counterclaims is evident on the face of the statute. See, *e.g.*, 7 U.S.C. § 18(c) (providing that before action will be taken on complaints filed by nonresident complainants, a bond must be filed which must cover, *inter alia*, "any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent") (emphasis added). Accordingly, the court below did not seriously contest that Congress intended to authorize the CFTC to adjudicate *some* counterclaims in reparations proceedings. Rather, the court read into the facially unqualified reference to counterclaim jurisdiction a distinction between counterclaims arising under the Act or CFTC regulations and all other counterclaims. While the court's reading permitted it to avoid a potential Article III problem, it did so only by doing violence to the CEA, for its distinction cannot fairly be drawn from the language or history of the CEA, nor reconciled with the congressional purposes motivating the creation of the reparations proceedings.

[17] We can find no basis in the language of the statute or its legislative history for the distinction posited by the Court of Appeals. Congress empowered the CFTC "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary *to effectuate any of the provisions or to accomplish any of the purposes of* [the CEA]." 7 U.S.C. § 12a(5) (emphasis added). The language of the congressional Report that specifically commented on the scope of the CFTCs authority over counterclaims unambiguously demonstrates that, consistent with the sweeping authority Congress delegated to the CFTC generally, Congress intended to vest in the CFTC the power to define the scope of the counterclaims cognizable in reparations proceedings:

> Counterclaims will be recognized in the [reparations] proceedings . . . on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. No. 93-975 (1974). Moreover, quite apart from congressional statements of intent, the broad grant of power in § 12a(5) clearly authorizes the promulgation of regulations providing for adjudication of common law counterclaims arising out of the same transaction as a reparations complaint because such jurisdiction is necessary, if not critical, to accomplish the purposes behind the reparations program.

[18] Reference to the instant controversy illustrates the crippling effect that the Court of Appeals' restrictive reading of the CFTC's counterclaim jurisdiction would have on the efficacy of the reparations remedy. The dispute between Schor and Conti is typical of the disputes adjudicated in reparations proceedings: a customer and a professional commodities broker agree

that there is a debit balance in the customer's account, but the customer attributes the deficit to the broker's alleged CEA violations and the broker attributes it to the customer's lack of success in the market. The customer brings a reparations claim; the broker counterclaims for the amount of the debit balance. In the usual case, then, the counterclaim "arises out of precisely the same course of events" as the principal claim and requires resolution of many of the same disputed factual issues. *Friedman v. Dean Witter & Co.*, [1980-1982 Transfer Binder] CCH Comm. Fut. L. Rep. § 21,307, p. 25,538 (1981).

[19] Under the Court of Appeals' approach, the entire dispute may not be resolved in the administrative forum. Consequently, the entire dispute will typically end up in court, for when the broker files suit to recover the debit balance, the customer will normally be compelled either by compulsory counterclaim rules or by the expense and inconvenience of litigating the same issues in two fora to forgo his reparations remedy and to litigate his claim in court. See, *e.g.*, App. 13 (Schor's motion to dismiss Contis federal court action) ("[C]ontinuation of this action, in light of the prior filed reparations proceedings, would be unjust to [Schor] in that it would require [him], at a great cost and expense, to litigate the same issues in two forums. If this action proceeds, defendants will be required pursuant to [Federal Rule of Civil Procedure 13(a)] to file a counterclaim in this action setting forth all the claims that they have already filed before the CFTC"). In sum, as Schor himself aptly summarized, to require a bifurcated examination of the single dispute "would be to emasculate if not destroy the purposes of the Commodity Exchange Act to provide an efficient and relatively inexpensive forum for the resolution of disputes in futures trading." *Id.*

[20] As our discussion makes manifest, the CFTCs long-held position that it has the power to take jurisdiction over counterclaims such as Conti's is eminently reasonable and well within the scope of its delegated authority. Accordingly, as the CFTC's contemporaneous interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1969). The Court of Appeals declined to defer to the CFTC's interpretation because, in its view, the Commission had not maintained a consistent position on the scope of its authority to adjudicate counterclaims and the question was not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, had superior expertise. We find both these reasons insubstantial.

* * *

[21] Moreover, we need not, as the Court of Appeals argued, rely simply on congressional "silence" to find approval of the CFTC's position in the subsequent amendments to the CEA. Congress explicitly affirmed the CFTCs authority to dictate the scope of its counterclaim jurisdiction in the 1983 amendments to the Act:

> The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation[,] the nature and scope of . . . counterclaims[,] and all other matters governing proceedings before the Commission under this section.

7 U.S.C. § 18(b). See also H.R. Rep. No. 97-565, pt. 1 (1982) ("[T]he reparations program seeks to pass upon the whole controversy surrounding each claim, including counter-claims arising out of the same set of facts"). Where, as here, "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," we cannot but deem that construction virtually conclusive. See *Red Lion Broadcasting*, 395 U.S. at 380-81.

[22] In view of the abundant evidence that Congress both contemplated and authorized the CFTC's assertion of jurisdiction over Conti's common law counterclaim, we conclude that the Court of Appeals analysis is untenable. The canon of construction that requires courts to avoid unnecessary constitutional adjudication did not empower the Court of Appeals to manufacture a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress and to reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate. We therefore are squarely faced with the question whether the CFTC's assumption of jurisdiction over common law counterclaims violates Article III of the Constitution.

III

[23] Article III, § 1, directs that the "judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office. Schor claims that these provisions prohibit Congress from authorizing the initial adjudication of common law counterclaims by the CFTC, an administrative agency whose adjudicatory officers do not enjoy the tenure and salary protections embodied in Article III.

[24] Although our precedents in this area do not admit of easy synthesis, they do establish that the resolution of claims such as Schor's cannot turn on conclusory reference to the language of Article III. See, *e.g.*, *Thomas*, 473 U.S. at 583. Rather, the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. See, *e.g.*, *id.* at 590; *Northern Pipeline*, 458 U.S. at 64. This inquiry, in turn, is guided by the principle that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas*, 473 U.S. at 587. See also *Crowell v. Benson*, 285 U.S. at 53.

A

[25] Article III, § 1, serves both to protect "the role of the independent judiciary within the constitutional scheme of tripartite government," *Thomas*, 473 U.S. at 583, and to safeguard litigants' "right to have claims decided before judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980). Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests. See, *e.g.*, *id.* at 90 (REHNQUIST, J., concurring in judgment) (noting lack of consent to non-Article III jurisdiction); *id.* at 95 (WHITE, J., dissenting) (same). See also Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 460, n.108 (1983) (Article III, § 1, "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision"). *Cf. Crowell v. Benson*, 285 U.S. at 87 (Brandeis, J., dissenting).

[26] Our precedents also demonstrate, however, that Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. See, *e.g.*, *Thomas*, 473 U.S. at 583; *Crowell v. Benson*. Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication. See, *e.g.*, 458 U.S. at 80 n.31; *id.* at 91 (REHNQUIST, J., concurring in judgment); *id.* at 95 (WHITE, J., dissenting). See also *Thomas*, 473 U.S. at 584, 591.

[27] In the instant cases, Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court. Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, and was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge to the CFTC's consideration of Conti's counterclaim.

[28] Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver. Three years before Schor instituted his reparations action, a private right of action under the CEA was explicitly recognized in the Circuit in which Schor and Conti filed suit in District Court. Moreover, at the time Schor decided to seek relief before the CFTC rather than in the federal courts, the CFTC's regulations made clear that it was empowered to adjudicate all counterclaims "aris[ing] out of the

same transaction or occurrence or series of transactions or occurrences set forth in the complaint." Thus, Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but, with full knowledge that the CFTC would exercise jurisdiction over that claim, chose to avail himself of the quicker and less expensive procedure Congress had provided him. In such circumstances, it is clear that Schor effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum.

B

[29] As noted above, our precedents establish that Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as "an inseparable element of the constitutional system of checks and balances." *Northern Pipeline*, 458 U.S. at 58. Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts, *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting), and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). See *Thomas*, 473 U.S. at 582-83; *Northern Pipeline*, 458 U.S. at 57-58, 73-74, 83, 86; *id.* at 98, 115-16 (WHITE, J., dissenting). To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

[30] In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. *Thomas*, 473 U.S. at 587. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. *Id.* at 590. Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. See, *e.g.*, *id.* at 587, 589-93; *Northern Pipeline*, 458 U.S. at 84-86.

[31] An examination of the relative allocation of powers between the CFTC and Article III courts in light of the considerations given prominence in our precedents demonstrates that the

congressional scheme does not impermissibly intrude on the province of the judiciary. The CFTC's adjudicatory powers depart from the traditional agency model in just one respect: the CFTC's jurisdiction over common law counterclaims. While wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties, we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical "slippery slope" may deposit us. Indeed, the CFTC's exercise of this type of jurisdiction is not without precedent. Thus, in *RFC v. Bankers Trust Co.*, 318 U.S. 163, 168-71 (1943), we saw no constitutional difficulty in the initial adjudication of a state law claim by a federal agency, subject to judicial review, when that claim was ancillary to a federal law dispute. Similarly, in *Katchen v. Landy*, 382 U.S. 323 (1966), this Court upheld a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction. We reasoned that, as a practical matter, requiring the trustee to commence a plenary action to recover on its counterclaim would be a "meaningless gesture." *Id.* at 334.

[32] In the instant cases, we are likewise persuaded that there is little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme. Aside from its authorization of counterclaim jurisdiction, the CEA leaves far more of the "essential attributes of judicial power" to Article III courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*. The CEA scheme in fact hews closely to the agency model approved by the Court in *Crowell v. Benson*, 285 U.S. 22 (1932).

[33] The CFTC, like the agency in *Crowell*, deals only with a "particularized area of law," *Northern Pipeline*, 458 U.S. at 85, whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." 28 U.S.C. § 1471(b) (quoted in *Northern Pipeline*, 458 U.S. at 85) (emphasis added). CFTC orders, like those of the agency in *Crowell*, but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the district court. CFTC orders are also reviewed under the same "weight of the evidence" standard sustained in *Crowell*, rather than the more deferential standard found lacking in *Northern Pipeline*. See *Northern Pipeline*, 458 U.S. at 85. The legal rulings of the CFTC, like the legal determinations of the agency in *Crowell*, are subject to *de novo* review. Finally, the CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise "all ordinary powers of district courts," and thus may not, for instance, preside over jury trials or issue writs of habeas corpus. 458 U.S. at 85.

[34] Of course, the nature of the claim has significance in our Article III analysis quite apart from the method prescribed for its adjudication. The counterclaim asserted in this litigation is a "private" right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the "core" of matters normally reserved to Article III courts. Yet this conclusion does not end our inquiry; just as this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights, *Thomas*, 473 U.S. at 585-86, there is no reason inherent in separation of powers principles to

accord the state law character of a claim talismanic power in Article III inquiries. See, *e.g.*, *Northern Pipeline*, 458 U.S. at 68 n.20; *id.* at 98 (WHITE, J., dissenting).

[35] We have explained that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers" is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication. *Thomas*, 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68). Similarly, the state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal will have on the separation of powers for the simple reason that private, common law rights were historically the types of matters subject to resolution by Article III courts. The risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress "withdraw[s] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty" and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). Accordingly, where private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching. In this litigation, however, "[l]ooking beyond form to the substance of what" Congress has done, we are persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTCs primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers. *Thomas*, 473 U.S. at 589.

[36] It is clear that Congress has not attempted to "withdraw from judicial cognizance" the determination of Conti's right to the sum represented by the debit balance in Schor's account. Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences. This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. But this case obviously bears no resemblance to such a scenario, given the degree of judicial control saved to the federal courts, as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.

[37] When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. Congress intended to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers. Its decision to endow the CFTC with jurisdiction over such reparations claims is readily understandable given the perception that the CFTC was relatively immune from political pressures, see H.R. Rep. No. 93-975 (1974), and the obvious expertise that the Commission possesses in applying the CEA and its own regulations. This reparations scheme itself is of unquestioned constitutional validity. See, *e.g.*, *Thomas*, 473 U.S. at 589; *Northern Pipeline*, 458 U.S. at 80-81; *Crowell v. Benson*, 285 U.S. 22 (1932). It was only to ensure the effectiveness of this scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims. Indeed, as was explained above, absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded.

[38] It also bears emphasis that the CFTC's assertion of counterclaim jurisdiction is limited to that which is necessary to make the reparations procedure workable. The CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.

[39] In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*. Conversely, were we to hold that the Legislative Branch may not permit such limited cognizance of common law counterclaims at the election of the parties, it is clear that we would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell v. Benson*, 285 U.S. at 46. See also *Thomas*, 473 U.S. at 583-84. We do not think Article III compels this degree of prophylaxis.

* * *

[40] In [resolving this case as we do], we have also been faithful to our Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. See, *e.g.*, *Thomas*, 473 U.S. 568 (1985). Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III. We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.

C

[41] Schor asserts that Article III, § 1, constrains Congress for reasons of federalism, as well as for reasons of separation of powers. He argues that the state law character of Conti's counterclaim transforms the central question in this litigation from whether Congress has trespassed upon the judicial powers of the Federal Government into whether Congress has invaded the prerogatives of state governments.

[42] At the outset, we note that our prior precedents in this area have dealt only with separation of powers concerns, and have not intimated that principles of federalism impose limits on Congress' ability to delegate adjudicative functions to non-Article III tribunals. This absence of discussion regarding federalism is particularly telling in *Northern Pipeline*, where the Court based its analysis solely on the separation of powers principles inherent in Article III despite the fact that the claim sought to be adjudicated in the bankruptcy court was created by state law.

[43] Even assuming that principles of federalism are relevant to Article III analysis, however, we are unpersuaded that those principles require the invalidation of the CFTC's counterclaim jurisdiction. The sole fact that Conti's counterclaim is resolved by a *federal* rather than a *state* tribunal could not be said to unduly impair state interests, for it is established that a federal court could, without constitutional hazard, decide a counterclaim such as the one asserted here under its ancillary jurisdiction, even if an independent jurisdictional basis for it were lacking. See, *e.g.*, *Baker v. Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974); *Moore v. New York Cotton Exchange*, 270 U.S. 593, 609 (1926). Given that the federal courts can and do exercise ancillary jurisdiction over counterclaims such as the one at issue here, the question becomes whether the fact that a federal agency rather than a federal Article III court initially hears the state law claim gives rise to a cognizably greater impairment of principles of federalism.

[44] Schor argues that those Framers opposed to diversity jurisdiction in the federal courts acquiesced in its inclusion in Article III only because they were assured that the federal judiciary would be protected by the tenure and salary provisions of Article III. He concludes, in essence, that to protect this constitutional compact, Article III should be read to absolutely preclude any adjudication of state law claims by federal decisionmakers that do not enjoy the Article III salary and tenure protections. We are unpersuaded by Schor's novel theory, which suffers from a number of flaws, the most important of which is that Schor identifies no historical support for the critical link he posits between the provisions of Article III that protect the independence of the federal judiciary and those provisions that define the extent of the judiciary's jurisdiction over state law claims.

[45] The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

[46] Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It further specifies that the federal judicial power must be exercised by judges who "shall hold their Offices during good Behaviour, and [who] shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

[47] On its face, Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch. The Court has, however, recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts, see, *e.g.*, *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); courts-martial, see, *e.g.*, *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857); and courts that adjudicate certain disputes concerning public rights, see, *e.g.*, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); *Crowell v. Benson*, 285 U.S. 22 (1932); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). Unlike the Court, I would limit the judicial authority of non-Article III federal tribunals to these few, long-established exceptions and would countenance no further erosion of Article III's mandate.

I

[48] The Framers knew that "[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 46 (H. Dawson ed. 1876) (J. Madison). In order to prevent such tyranny, the Framers devised a governmental structure composed of three distinct branches — "a vigorous Legislative Branch," "a separate and wholly independent Executive Branch," and "a Judicial Branch equally independent." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*). "'The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question." *Bowsher*, 478 U.S. at 725 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). The federal judicial power, then, must be exercised by judges who are independent of the Executive and the Legislature in order to maintain the checks and balances that are crucial to our constitutional structure.

[49] The Framers also understood that a principal benefit of the separation of the judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures. Article III's salary and tenure

provisions promote impartial adjudication by placing the judicial power of the United States "in a body of judges insulated from majoritarian pressures and thus able to enforce [federal law] without fear of reprisal or public rebuke." *United States v. Raddatz*, 447 U.S. 667, 704 (1980) (MARSHALL, J., dissenting). As Alexander Hamilton observed, "[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the Courts of justice can certainly not be expected from Judges who hold their offices by a temporary commission." The Federalist No. 78 (H. Dawson ed. 1876). This is so because

> [i]f the power of making [periodic appointments] was committed either to the Executive or Legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the People, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Id. "Next to permanency in office," Hamilton added, "nothing can contribute more to the independence of the Judges than a fixed provision for their support" because "*a power over a man's subsistence amounts to a power over his will*." *Id.* at 548 (emphasis in original).

[50] These important functions of Article III are too central to our constitutional scheme to risk their incremental erosion. The exceptions we have recognized for territorial courts, courts-martial, and administrative courts were each based on "certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus." *Northern Pipeline*, 458 U.S. at 70 (opinion of BRENNAN, J.). Here, however, there is no equally forceful reason to extend further these exceptions to situations that are distinguishable from existing precedents. The Court, however, engages in just such an extension. By sanctioning the adjudication of state-law counterclaims by a federal administrative agency, the Court far exceeds the analytic framework of our precedents.

[51] More than a century ago, we recognized that Congress may not "withdraw from [Article III] judicial cognizance any matter *which, from its nature, is the subject of a suit at the common law*, or in equity, or admiralty." *Murray's Lessee*, 59 U.S. at 284 (emphasis added). More recently, in *Northern Pipeline*, the view of a majority of the Court that the breach-of-contract and misrepresentation claims at issue in that case lay "at the core of the historically recognized judicial power," *id.* at 70 (opinion of BRENNAN, J.), and were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *id.* at 90 (opinion of REHNQUIST, J.), contributed significantly to the Court's conclusion that the bankruptcy courts could not constitutionally adjudicate Northern Pipeline's common-law claims. In the instant litigation, the Court lightly discards both history and our precedents. The Court attempts to support the substantial alteration it works today in our Article III jurisprudence by pointing, *inter alia*, to legislative convenience; to the fact that Congress does not altogether eliminate

federal-court jurisdiction over ancillary state-law counterclaims; and to Schor's "consent" to CFTC adjudication of ContiCommodity's counterclaims.* In my view, the Court's effort fails.

II

[52] The Court states that in reviewing Article III challenges, one of several factors we have taken into account is "the concerns that drove Congress to depart from the requirements of Article III." The Court identifies the desire of Congress "to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers" as the motivating congressional concern here. The Court further states that "[i]t was only to ensure the effectiveness of this scheme that Congress authorized the CFTC to assert jurisdiction over common-law counterclaims[;] absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded." Were we to hold that the CFTC's authority to decide common-law counterclaims offends Article III, the Court declares, "it is clear that we would defeat the obvious purpose of the legislation." Article III, the Court concludes, does not "compe[l] this degree of prophylaxis."

[53] I disagree — Article III's prophylactic protections were intended to prevent just this sort of abdication to claims of legislative convenience. The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence. See Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Decision, 1983 Duke L.J. 197, 221-22. The danger of the Court's balancing approach is, of course, that as individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated.

[54] Perhaps the resolution of reparations claims such as respondents may be accomplished more conveniently under the Court's decision than under my approach, but the Framers foreswore this sort of convenience in order to preserve freedom. As we explained in *INS v. Chadha*, 462 U.S. 919, 959 (1983):

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*The Court also rests its holding on the fact that Congress has not assigned the same sweeping judicial powers to the CFTC that it had assigned to the bankruptcy courts under the Bankruptcy Act of 1978 and that we held violated Article III in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). While I agree with the Court that the grant of judicial authority to the CFTC is significantly narrower in scope than the grant to the bankruptcy courts under the 1978 Act, in my view, that difference does not suffice to cure the constitutional defects raised by the grant of authority over state-law counterclaims to the CFTC.

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked . . . . With all the obvious flaws of delay [and] untidiness[,] we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Moreover, in *Bowsher v. Synar* we rejected the appellants' argument that legislative convenience saved the constitutionality of the assignment by Congress to the Comptroller General of essentially executive functions, stating: "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . ." 478 U.S. at 736 (quoting *Chadha*, 462 U.S. at 944). We recognized that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Bowsher*, 478 U.S. at 727 (quoting *Chadha*, 462 U.S. at 951). Despite the "conflicts, confusion, and discordance" that separation of powers may at times generate, *Bowsher*, 478 U.S. at 722, we held that it is necessary to endure the inconvenience of separated powers in order "to secure liberty." *Id.* at at 721 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

[55] It is impossible to reconcile the radically different approaches the Court takes to separation of powers in this litigation and in *Bowsher*. The Framers established *three* co-equal branches of government and intended to preserve *each* from encroachment by either of the others. The Constitution did not grant Congress the general authority to bypass the Judiciary whenever Congress deems it advisable, any more than it granted Congress the authority to arrogate to itself executive functions.

III

[56] According to the Court, the intrusion into the province of the Federal Judiciary caused by the CFTC's authority to adjudicate state-law counterclaims is insignificant, both because the CFTC *shares* in, rather than displaces, federal district court jurisdiction over these claims and because only a very narrow class of state-law issues are involved. The "sharing" justification fails under the reasoning used by the Court to support the CFTC's authority. If the administrative reparations proceeding is so much more convenient and efficient than litigation in federal district court that abrogation of Article III's commands is warranted, it seems to me that complainants would rarely, if ever, choose to go to district court in the first instance. Thus, any "sharing" of jurisdiction is more illusory than real.

[57] More importantly, the Court, in emphasizing that *this litigation* will permit solely a narrow class of state-law claims to be decided by a non-Article III court, ignores the fact that it

establishes a broad principle. The decision today may authorize the administrative adjudication only of state-law claims that stem from the same transaction or set of facts that allow the customer of a professional commodity broker to initiate reparations proceedings before the CFTC, but the reasoning of this decision strongly suggests that, given "legislative necessity" and party consent, any federal agency may decide state-law issues that are ancillary to federal issues within the agency's jurisdiction. Thus, while in this litigation "the magnitude of any intrusion on the Judicial Branch" may conceivably be characterized as "*de minimis*," the potential impact of the Court's decision on federal-court jurisdiction is substantial. The Court dismisses warnings about the dangers of its approach, asserting simply that it does not fear the slippery slope, and that this litigation does not involve the creation by Congress of a "phalanx of non-Article III tribunals equipped to handle the *entire* business of the Article III courts." A healthy respect for the precipice on which we stand is warranted, however, for this reason: Congress can seriously impair Article III's structural and individual protections without assigning away "the entire business of the Article III courts." (Emphasis added.) It can do so by *diluting* the judicial power of the federal courts. And, contrary to the Court's intimations, dilution of judicial power operates to impair the protections of Article III regardless of whether Congress acted with the "good intention" of providing a more efficient dispute resolution system or with the "bad intention" of strengthening the Legislative Branch at the expense of the Judiciary.

IV

[58] The Courts reliance on Schor's "consent" to a non-Article III tribunal is also misplaced. The Court erroneously suggests that there is a clear division between the separation of powers and the impartial adjudication functions of Article III. The Court identifies Article III's structural, or separation-of-powers, function as preservation of the Judiciary's domain from encroachment by another branch. The Court identifies the impartial adjudication function as the protection afforded by Article III to individual litigants against judges who may be dominated by other branches of government.

[59] In my view, the structural and individual interests served by Article III are inseparable. The potential exists for individual litigants to be deprived of impartial decisionmakers only where federal officials who exercise judicial power are susceptible to congressional and executive pressure. That is, individual litigants may be harmed by the assignment of judicial power to non-Article III federal tribunals only where the Legislative or Executive Branches have encroached upon judicial authority and have thus threatened the separation of powers. The Court correctly recognizes that to the extent that Article III's structural concerns are implicated by a grant of judicial power to a non-Article III tribunal, "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." Because the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required. In other words, consent is irrelevant to Article III analysis.

V

[60] Our Constitution unambiguously enunciates a fundamental principle — that the "judicial Power of the United States" be reposed in an independent Judiciary. It is our obligation zealously to guard that independence so that our tripartite system of government remains strong and that individuals continue to be protected against decisionmakers subject to majoritarian pressures. Unfortunately, today the Court forsakes that obligation for expediency. I dissent.

Notes on Schor

1. Is *Schor* faithful to *Northern Pipeline*? Please note that Justice O'Connor, who wrote *Schor*, concurred in the judgment in *Northern Pipeline*. Please also note that Justice White, who wrote a vehement dissent in *Northern Pipeline*, was a member of the majority in *Schor*. Does *Schor* (along with *Thomas*, which Justice O'Connor cites frequently) represent a repudiation of *Northern Pipeline*? If not, what remained of *Northern Pipeline* in the wake of this case? Is there some critical distinction between the bankruptcy courts at issue in *Northern Pipeline* and the CFTC courts at issue in *Schor* that explains the different results in the two cases? If so, what is that distinction?

2. *Schor* exemplifies a "functionalist" approach to the question of when Congress may authorize a non-Article III court to resolve a dispute. *Northern Pipeline*, by contrast, exemplifies a "formalist" approach to the same question. Note the flexibility of the test Justice O'Connor sets forth to resolve *Schor*:

> In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, *the Court has declined to adopt formalistic and unbending rules*. *Thomas*, 473 U.S. at 587. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, *we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary*. *Id.* at 590. Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. See, *e.g.*, *id.* at 587, 589-93; *Northern Pipeline*, 458 U.S. at 84-86.

Schor ¶ [30] (editor's emphasis). Do you think Justice Brennan, the author of the plurality in *Northern Pipeline*, would agree that "the Court has declined to adopt formalistic . . . rules"

3. You may have noticed a minor theme of the Seventh Amendment playing in this portion of the course. (This amendment provides in relevant part that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."). Article III and the Seventh Amendment complement each other in many respects. That is, to the extent Article III requires that a dispute be resolved by a federal court, the Seventh Amendment may also require that it be tried to a jury, if it's an action at law. In fact — to add yet another concept to the mix — the concept of "public rights," which we have been discussing, may also pick up where the Seventh Amendment leaves off. As Justice Brennan explained in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989):

> In *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), we noted that Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity. Our case law makes plain, however, that the class of "public rights" whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*'s discussion suggests. Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as [Nordberg's] right to recover a fraudulent conveyance [from Granfinanciera] under 11 U.S.C. § 548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder. . . . .

As you may recall, the Court was able to avoid the reach of the Seventh Amendment in *Crowell* on the ground that *Crowell* sounded in admiralty, not law. In *Granfinanciera*, the Court held that Granfinanciera was entitled to a jury. As Justice Brennan wrote:

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees — suits which, we said in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92,

> 94-95 (1932), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it" — quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right.

Granfinanciera, 492 U.S. at 56. You will see more about the Seventh Amendment in *Oil States*.

[10] **Stern v. Marshall**
564 U.S. 462 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[1] This "suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."

[2] Those words were not written about this case, but they could have been. This is the second time we have had occasion to weigh in on this long running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way through state and federal courts in Louisiana, Texas, and California, and two of those courts — a Texas state probate court and the Bankruptcy Court for the Central District of California — have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding.[1] To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

[3] Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, § 1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. Those requirements of Article III were not honored here. The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so.

[1]Because both Vickie and Pierce passed away during this litigation, the parties in this case are Vickie's estate and Pierce's estate. We continue to refer to them as "Vickie" and "Pierce."

I

[4] Because we have already recounted the facts and procedural history of this case in detail, see *Marshall v. Marshall*, 547 U.S. 293 (2006), we do not repeat them in full here. Of current relevance are two claims Vickie filed in an attempt to secure half of J. Howard's fortune. Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death. Although J. Howard bestowed on Vickie many monetary and other gifts during their courtship and marriage, he did not include her in his will. Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce — J. Howard's younger son — fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. Pierce denied any fraudulent activity and defended the validity of J. Howard's trust and, eventually, his will.

[5] After J. Howard's death, Vickie filed a petition for bankruptcy in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. Pierce subsequently filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from Vickie's bankruptcy estate. Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J. Howard. As she had in state court, Vickie alleged that Pierce had wrongfully prevented J. Howard from taking the legal steps necessary to provide her with half his property.

[6] On November 5, 1999, the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation. On September 27, 2000, after a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages.

[7] In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U.S.C. § 157(b)(2)(C). As explained below, bankruptcy courts may hear and enter final judgments in "core proceedings" in a bankruptcy case. In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. . . . .

* * *

[8] [After an earlier trip to this Court, the Court of Appeals ultimately] concluded that "a counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the

[Bankruptcy] Code only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." The court ruled that Vickie's counterclaim did not meet that test. That holding made "the Texas probate court's judgment . . . the earliest final judgment entered on matters relevant to this proceeding," and therefore the Court of Appeals concluded that the District Court should have "afford[ed] preclusive effect" to the Texas "court's determination of relevant legal and factual issues."

[9] We again granted certiorari.

II

A

[10] With certain exceptions not relevant here, the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." District courts may refer any or all such proceedings to the bankruptcy judges of their district, which is how the Bankruptcy Court in this case came to preside over Vickie's bankruptcy proceedings. District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, bankruptcy judges for each district have been appointed to 14-year terms by the courts of appeals for the circuits in which their district is located.

[11] The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." "Core proceedings include, but are not limited to" 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards.

[12] When a bankruptcy judge determines that a referred "proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects.

B

[13] Vickie's counterclaim against Pierce for tortious interference is a "core proceeding" under the plain text of § 157(b)(2)(C). That provision specifies that core proceedings include

"counterclaims by the estate against persons filing claims against the estate." [The Court went on to defend this interpretation of the statute against various objections.]

* * *

III

[14] Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.

A

* * *

[15] In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[] truly distinct from both the legislature and the executive." The Federalist No. 78 (Hamilton). As Hamilton put it, quoting Montesquieu, "there is no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* (quoting 1 Montesquieu, Spirit of Laws 181).

[16] We have recognized that the three branches are not hermetically sealed from one another, but it remains true that Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211 (2011).

[17] Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896).

[18] Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government

could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job — resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law" — to the Judiciary. *Id.* at 86-87, n.39 (plurality opinion).

B

[19] This is not the first time we have faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline*, we considered whether bankruptcy judges serving under the Bankruptcy Act of 1978 — appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III — could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. 458 U.S. at 53, 87, n.40 (plurality opinion). The Court concluded that assignment of such state law claims for resolution by those judges "violates Art. III of the Constitution." *Id.* at 52, 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment).

[20] The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. That opinion concluded that this "public rights" exception extended "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those" branches. *Id.* at 67-68. A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case.

* * *

[21] After our decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located. 28 U.S.C. § 152(a). And, as we have explained, Congress permitted the newly constituted bankruptcy courts to enter final judgments only in "core" proceedings.

[22] With respect to such "core" matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978. As in *Northern Pipeline*, for example, the newly constituted bankruptcy courts are charged under § 157(b)(2)(C) with resolving "[a]ll matters of fact and law in whatever domains of the law to which" a counterclaim may lead. 458 U.S. at 91 (Rehnquist, J., concurring in judgment); see, *e.g.*, 275 B.R. at 50-51 (noting that Vickie's counterclaim required the bankruptcy court to determine whether Texas recognized a cause of action for tortious interference with an *inter vivos* gift — something the Supreme Court of Texas had yet to do). As in *Northern Pipeline*, the new courts in core proceedings "issue final judgments, which are binding and enforceable even in the absence of an appeal." 458 U.S. at 85-86 (plurality opinion). And, as in *Northern Pipeline*, the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges' findings of fact.

C

[23] Vickie and the dissent argue that the Bankruptcy Court's entry of final judgment on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. It is clear that the Bankruptcy Court in this case exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*. No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*. . . . . Here Vickie's claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy. *Northern Pipeline* and our subsequent decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), rejected the application of the "public rights" exception in such cases.

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[24] Vickie's counterclaim cannot be deemed a matter of "public right" that can be decided outside the Judicial Branch. As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate. Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions.

[25] We first recognized the category of public rights in *Murray's Lessee*, 59 U.S. 272 (1856). That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on

its behalf. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III.

[26] "To avoid misconstruction upon so grave a subject," the Court laid out the principles guiding its analysis. *Id.* at 284. It confirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.* The Court also recognized that "[a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*

[27] As an example of such matters, the Court referred to "[e]quitable claims to land by the inhabitants of ceded territories" and cited cases in which land issues were conclusively resolved by Executive Branch officials. *Id.* In those cases "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. *Id.* at 284. The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the "public rights" category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.

[28] Subsequent decisions from this Court contrasted cases within the reach of the public rights exception — those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" — and those that were instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932).[6] See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S.

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[6]Although the Court in *Crowell* went on to decide that the facts of the private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. In other words, the agency in *Crowell* functioned as a true "adjunct" of the District Court. That is not the case here.

Although the dissent suggests that we understate the import of *Crowell* in this regard, the dissent itself recognizes — repeatedly — that *Crowell* by its terms addresses the determination of *facts* outside Article III. *Crowell* may well have additional significance in the context of expert administrative agencies that oversee particular substantive federal regimes, but we have no occasion to and do not address those issues today. The United States apparently agrees that any

442, 458 (1977) (Exception extends to cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights," while "[w]holly private tort, contract, and property cases, as well as a vast range of other cases . . . are not at all implicated").

[29] Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular federal government action. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) ("The distinction between 'public rights' against the Government and 'private rights' between private parties is well established," citing *Murray's Lessee* and *Crowell*).

[30] Our decision in *Thomas v. Union Carbide Agricultural Products Co.*, for example, involved a data-sharing arrangement between companies under a federal statute providing that disputes about compensation between the companies would be decided by binding arbitration. 473 U.S. 568, 571-75 (1985). This Court held that the scheme did not violate Article III, explaining that "[a]ny right to compensation . . . results from [the statute] and does not depend on or replace a right to such compensation under state law." *Id.* at 584.

[31] *Commodity Futures Trading Commission v. Schor* concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures Trading Commission. 478 U.S. 833, 836 (1986). A customer filed such a claim to recover a debit balance in his account, while the broker filed a lawsuit in Federal District Court to recover the same amount as lawfully due from the customer. The broker later submitted its claim to the CFTC, but after that agency ruled against the customer, the customer argued that agency jurisdiction over the broker's counterclaim violated Article III. This Court disagreed, but only after observing that (1) the claim and the counterclaim concerned a "single dispute" — the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a "particularized area of law"; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." *Id.* at 844, 852-55. Most significantly, given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was "necessary" to allow the agency to exercise jurisdiction over the broker's claim, or else "the reparations procedure would have been confounded." *Id.* at 856.

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broader significance of *Crowell* is not pertinent in this case, citing to *Crowell* in its brief only once, in the last footnote, again for the limited proposition discussed above.

[32] The most recent case in which we considered application of the public rights exception — and the only case in which we have considered that doctrine in the bankruptcy context since *Northern Pipeline* — is *Granfinanciera*, 492 U.S. 33 (1989). In *Granfinanciera* we rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the "public rights" exception. We explained that, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.* at 54-55. We reasoned that fraudulent conveyance suits were "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. As a consequence, we concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55.[7]

[33] Vickie's counterclaim — like the fraudulent conveyance claim at issue in *Granfinanciera* — does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, or one that "historically could have been determined exclusively by" those branches, *Northern Pipeline*, 458 U.S. at 68. The claim is instead one under state common law between two private parties. It does not "depend[] on the will of congress," *Murray's Lessee*, 59 U.S. at 284; Congress has nothing to do with it.

[34] In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, 473 U.S. at 584-85, or *Atlas Roofing*, 430 U.S. at 458. It is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, 478 U.S. at 856. And in contrast to the objecting party in *Schor*, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate. See *Granfinanciera*, 492 U.S. at 59, n.14 (noting that "[p]arallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims").[8]

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[7]We noted that we did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right." 492 U.S. at 56, n.11. Our conclusion was that, "even if one accepts this thesis," Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court. *Id.* Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here.

[8]Contrary to the claims of the dissent, Pierce did not have another forum in which to pursue his claim to recover from Vickie's pre-bankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. Creditors who possess claims that do not satisfy the requirements for nondischargeability under 11 U.S.C. § 523 have no choice but to file their claims in bankruptcy proceedings if they want to pursue the claims at all. That is

[35] Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law," as in *Crowell*, *Thomas*, and *Schor*. We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell*, 285 U.S. at 46. The "experts" in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

[36] The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." Just so: Substitute "tort" for "contract," and that statement directly covers this case.

* * *

2

[37] Vickie and the dissent next attempt to distinguish *Northern Pipeline* and *Granfinanciera* on the ground that Pierce, unlike the defendants in those cases, had filed a proof of claim in the bankruptcy proceedings. Given Pierce's participation in those proceedings, Vickie argues, the Bankruptcy Court had the authority to adjudicate her counterclaim under our decisions in *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990) (*per curiam*).

[38] We do not agree. As an initial matter, it is hard to see why Pierce's decision to file a claim should make any difference with respect to the characterization of Vickie's counterclaim. "[P]roperty interests are created and defined by state law, and [u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 451 (2007). Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate — the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court.

[39] Contrary to Vickie's contention, moreover, our decisions in *Katchen* and *Langenkamp* do not suggest a different result. *Katchen* permitted a bankruptcy referee acting

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why, as we recognized in *Granfinanciera*, the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.

under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as "summary jurisdiction" over a voidable preference claim brought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee.

[40] Although the creditor in *Katchen* objected that the preference issue should be resolved through a "plenary suit" in an Article III court, this Court concluded that summary adjudication in bankruptcy was appropriate, because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue. There was no question that the bankruptcy referee could decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. Once the referee did that, "nothing remains for adjudication in a plenary suit"; such a suit "would be a meaningless gesture." *Id.* at 334. The plenary proceeding the creditor sought could be brought into the bankruptcy court because "the same issue [arose] as part of the process of allowance and disallowance of claims." *Id.* at 336.

[41] It was in that sense that the Court stated that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." *Id.* at 333, n.9. In *Katchen* one of those consequences was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court. Indeed, the *Katchen* Court expressly noted that it "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." *Id.* at 333, n.9.

[The Chief Justice then distinguished *Langenkamp* on similar grounds.]

[42] In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. *Katchen*, 382 U.S. at 332, n.9. There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory, or at least in an "attenuated" sense related to Pierce's claim. But there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim. See 264 B.R. at 631, 632 (explaining that "the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements," and "the counterclaim raises issues of law entirely

different from those raise[d] on the defamation claim"). The United States acknowledges the point.

[43] The only overlap between the two claims in this case was the question whether Pierce had in fact tortiously taken control of his father's estate in the manner alleged by Vickie in her counterclaim and described in the allegedly defamatory statements. From the outset, it was clear that, even assuming the Bankruptcy Court would (as it did) rule in Vickie's favor on that question, the court could not enter judgment for Vickie unless the court additionally ruled on the questions whether Texas recognized tortious interference with an expected gift as a valid cause of action, what the elements of that action were, and whether those elements were met in this case. Assuming Texas accepted the elements adopted by other jurisdictions, that meant Vickie would need to prove, above and beyond Pierce's tortious interference, (1) the existence of an expectancy of a gift; (2) a reasonable certainty that the expectancy would have been realized but for the interference; and (3) damages. Also, because Vickie sought punitive damages in connection with her counterclaim, the Bankruptcy Court could not finally dispose of the case in Vickie's favor without determining whether to subject Pierce to the sort of "retribution," "punishment[,] and deterrence," *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492, 504 (2008), those damages are designed to impose. There thus was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim.

[44] In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U.S.C. § 547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U.S. at 43. In *Katchen*, "[t]he Trustee . . . [asserted] that the payments made [to the creditor] were preferences inhibited by Section 60a of the Bankruptcy Act." Memorandum Opinion (Feb. 8, 1963), Tr. of Record in O.T. 1965, No. 28, p. 3. Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

[45] In light of all the foregoing, we disagree with the dissent that there are no "relevant distinction[s]" between Pierce's claim in this case and the claim at issue in *Langenkamp*. We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*. *Granfinanciera*'s distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res" reaffirms that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Vickie has failed to demonstrate that her counterclaim falls within one of the "limited circumstances" covered by the public rights exception, particularly given our conclusion that, "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Northern Pipeline*, 458 U.S. at 69 n.23, 77 n.29 (plurality opinion).

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D

[46] Finally, Vickie and her *amici* predict as a practical matter that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983).

[47] In addition, we are not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest. The dissent asserts that it is important that counterclaims such as Vickie's be resolved "in a bankruptcy court," and that, "to be effective, a single tribunal must have broad authority to restructure [debtor-creditor] relations." But the framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts. Section 1334(c)(2), for example, requires that bankruptcy courts abstain from hearing specified non-core, state law claims that "can be timely adjudicated[] in a State forum of appropriate jurisdiction." Section 1334(c)(1) similarly provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, "in the interest of comity with State courts or respect for State law."

[48] As described above, the current bankruptcy system also requires the district court to review *de novo* and enter final judgment on any matters that are "related to" the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d). . . . . We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one.

* * *

[49] Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SCALIA, concurring.

[50] I agree with the Court's interpretation of our Article III precedents, and I accordingly join its opinion. I adhere to my view, however, that — our contrary precedents notwithstanding — "a matter of public rights . . . must at a minimum arise between the government and others," *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65 (1989) (SCALIA, J., concurring in part and concurring in judgment).

[51] The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. I count at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit: that it was one "under state common law" which was "not a matter that can be pursued only by grace of the other branches;" that it was "not 'completely dependent upon' adjudication of a claim created by federal law;" that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings;" that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law;'" that "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim;" that the trustee was not "asserting a right of recovery created by federal bankruptcy law;" and that the Bankruptcy Judge "ha[d] the power to enter 'appropriate orders and judgments' — including final judgments — subject to review only if a party chooses to appeal."

[52] Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. For example, Article III gives no indication that state-law claims have preferential entitlement to an Article III judge; nor does it make pertinent the extent to which the area of the law is "particularized." The multi-factors relied upon today seem to have entered our jurisprudence almost randomly.

[53] Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason — and not because of some intuitive balancing of benefits and harms — I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate; the subject has not been briefed, and so I state no position on the matter. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

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[54] . . . . The question before us is whether the Bankruptcy Court possessed jurisdiction to adjudicate Vickie Marshall's counterclaim. I agree with the Court that the bankruptcy statute authorizes a bankruptcy court to adjudicate the counterclaim. But I do not agree with the majority about the statute's constitutionality. I believe the statute is consistent with the Constitution's delegation of the "judicial Power of the United States" to the Judicial Branch of Government. Consequently, it is constitutional.

I

[55] My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents. In my view, the majority overstates the current relevance of statements this Court made in an 1856 case, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, and it overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and that was subsequently disavowed. At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell v. Benson*, 285 U.S. 22 (1932). And it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III. See *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

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B

[56] [As noted,] I believe the majority places insufficient weight on *Crowell*, a seminal case that clarified the scope of the dictum in *Murray's Lessee*. In that case, the Court considered whether Congress could grant to an Article I administrative agency the power to adjudicate an employee's workers' compensation claim against his employer. The Court assumed that an Article III court would review the agency's decision *de novo* in respect to questions of law but it would conduct a less searching review (looking to see only if the agency's award was "supported by evidence in the record") in respect to questions of fact. *Crowell*, 285 U.S. at 48-50. The Court pointed out that the case involved a dispute between private persons (a matter of "private rights") and (with one exception not relevant here) it upheld Congress' delegation of primary factfinding authority to the agency.

* * *

[57] *Crowell* has been hailed as "the greatest of the cases validating administrative adjudication." Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 251 (1990). Yet, in a footnote, the majority distinguishes *Crowell* as a case in which the Court upheld the delegation of adjudicatory authority to an administrative agency simply because the agency's power to make the "specialized, narrowly confined factual determinations" at issue arising in a "particularized area of law," made the agency a "true 'adjunct' of the District Court." *Ante* n.6. Were *Crowell*'s holding as narrow as the majority suggests, one could question the validity of Congress' delegation of authority to adjudicate disputes among private parties to other agencies such as the National Labor Relations Board, the Commodity Futures Trading Commission, the Surface Transportation Board, and the Department of Housing and Urban Development, thereby resurrecting important legal questions previously thought to have been decided.

C

[58] The majority, in my view, overemphasizes the precedential effect of the plurality opinion in *Northern Pipeline*. There, the Court held unconstitutional the jurisdictional provisions of the Bankruptcy Act of 1978 granting adjudicatory authority to bankruptcy judges who lack the protections of tenure and compensation that Article III provides. Four Members of the Court wrote that Congress could grant adjudicatory authority to a non-Article III judge only where (1) the judge sits on a "territorial cour[t]" (2) the judge conducts a "courts-martial," or (3) the case involves a "public right," namely, a "matter" that "at a minimum arise[s] 'between the government and others.'" 458 U.S. at 64-70 (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). Two other Members of the Court, without accepting these limitations, agreed with the result because the case involved a breach-of-contract claim brought by the bankruptcy trustee on behalf of the bankruptcy estate against a third party who was not part of the bankruptcy proceeding, and none of the Court's preceding cases (which, the two Members wrote, "do not admit of easy synthesis") had "gone so far as to sanction th[is] type of adjudication." 458 U.S. at 90-91 (Rehnquist, J. concurring in judgment).

[59] Three years later, the Court held that *Northern Pipeline*

> establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Thomas, 473 U.S. at 584.

D

[60] Rather than leaning so heavily on the approach taken by the plurality in *Northern Pipeline*, I would look to this Court's more recent Article III cases *Thomas* and *Schor* — cases that commanded a clear majority. In both cases the Court took a more pragmatic approach to the constitutional question. It sought to determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.

* * *

II

A

[61] This case law, as applied in *Thomas* and *Schor*, requires us to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. That is to say, we must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government. Those factors include (1) the nature of the claim to be adjudicated; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties' consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections. The presence of "private rights" does not automatically determine the outcome of the question but requires a more "searching" examination of the relevant factors. *Schor*, 478 U.S. at 854.

* * *

B

[62] Applying *Schor*'s approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.

[74] First, I concede that *the nature of the claim to be adjudicated* argues against my conclusion. Vickie Marshall's counterclaim — a kind of tort suit — resembles "a suit at the common law." *Murray's Lessee*, 59 U.S. at 284. Although not determinative of the question, a

delegation of authority to a non-Article III judge to adjudicate a claim of that kind poses a heightened risk of encroachment on the Federal Judiciary.

[64] At the same time the significance of this factor is mitigated here by the fact that bankruptcy courts often decide claims that similarly resemble various common-law actions. Suppose, for example, that ownership of 40 acres of land in the bankruptcy debtor's possession is disputed by a creditor. If that creditor brings a claim in the bankruptcy court, resolution of that dispute requires the bankruptcy court to apply the same state property law that would govern in a state court proceeding. This kind of dispute arises with regularity in bankruptcy proceedings. Of course, in this instance the state-law question is embedded in a debtor's counterclaim, not a creditor's claim. But the counterclaim is "compulsory." It "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rule Civ. Proc. 13(a); Fed. Rule Bkrtcy. Proc. 7013. Thus, resolution of the counterclaim will often turn on facts identical to, or at least related to, those at issue in a creditor's claim that is undisputedly proper for the bankruptcy court to decide.

[65] Second, *the nature of the non-Article III tribunal* argues in favor of constitutionality. That is because the tribunal is made up of judges who enjoy considerable protection from improper political influence. Unlike the 1978 Act which provided for the appointment of bankruptcy judges by the President with the advice and consent of the Senate, current law provides that the federal courts of appeals appoint federal bankruptcy judges. Bankruptcy judges are removable by the circuit judicial council (made up of federal court of appeals and district court judges) and only for cause. Their salaries are pegged to those of federal district court judges, and the cost of their courthouses and other work-related expenses are paid by the Judiciary. Thus, although Congress technically exercised its Article I power when it created bankruptcy courts, functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary's administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.

[66] Third, *the control exercised by Article III judges over bankruptcy proceedings* argues in favor of constitutionality. Article III judges control and supervise the bankruptcy court's determinations — at least to the same degree that Article III judges supervised the agency's determinations in *Crowell*, if not more so. Any party may appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law *de novo*. But for the here-irrelevant matter of what *Crowell* considered to be special "constitutional" facts, the standard of review for factual findings here ("clearly erroneous") is more stringent than the standard at issue in *Crowell* (whether the agency's factfinding was "supported by evidence in the record"). 285 U.S. at 48; see *Dickinson v. Zurko*, 527 U.S. 150, 152, 153 (1999) ("unsupported by substantial evidence" more deferential than "clearly erroneous"). And, as *Crowell* noted, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." 285 U.S. at 51.

[67] Moreover, in one important respect Article III judges maintain greater control over the bankruptcy court proceedings at issue here than they did over the relevant proceedings in any of the previous cases in which this Court has upheld a delegation of adjudicatory power. The District Court here may "withdraw, in whole or in part, any case or proceeding referred [to the Bankruptcy Court] . . . on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. § 157(d).

[68] Fourth, the fact that *the parties have consented* to Bankruptcy Court jurisdiction argues in favor of constitutionality, and strongly so. Pierce Marshall, the counterclaim defendant, is not a stranger to the litigation, forced to appear in Bankruptcy Court against his will. Rather, he appeared voluntarily in Bankruptcy Court as one of Vickie Marshall's creditors, seeking a favorable resolution of his claim against Vickie Marshall to the detriment of her other creditors. He need not have filed a claim, perhaps not even at the cost of bringing it in the future, for he says his claim is "nondischargeable," in which case he could have litigated it in a state or federal court after distribution. Thus, Pierce Marshall likely had "an alternative forum to the bankruptcy court in which to pursue [his] clai[m]." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59, n.14 (1989).

* * *

[69] Fifth, *the nature and importance of the legislative purpose served* by the grant of adjudicatory authority to bankruptcy tribunals argues strongly in favor of constitutionality. Congress' delegation of adjudicatory powers over counterclaims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end. Article I, § 8, of the Constitution explicitly grants Congress the "Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." . . . .

[70] Congress established the first Bankruptcy Act in 1800. From the beginning, the "core" of federal bankruptcy proceedings has been "the restructuring of debtor-creditor relations." *Northern Pipeline*, 458 U.S. at 71 (plurality opinion). And, to be effective, a single tribunal must have broad authority to restructure those relations, "having jurisdiction of the parties to controversies brought before them," "decid[ing] all matters in dispute," and "decree[ing] complete relief." *Katchen v. Landy*, 382 U.S. 323, 335 (1966).

* * *

[71] [A] bankruptcy court's determination of such matters [as Vickie's counterclaim against Pierce] has more than "some bearing on a bankruptcy case[,]" [as the majority argues]. It plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system. At the least, that is what Congress concluded. We owe deference to that determination, which shows the absence of any legislative or executive motive, intent, purpose, or desire to encroach upon areas that Article III reserves to judges to whom it grants tenure and compensation protections.

* * *

III

[72] The majority predicts that as a "practical matter" today's decision "does not change all that much." But I doubt that is so. Consider a typical case: A tenant files for bankruptcy. The landlord files a claim for unpaid rent. The tenant asserts a counterclaim for damages suffered by the landlord's (1) failing to fulfill his obligations as lessor, and (2) improperly recovering possession of the premises by misrepresenting the facts in housing court. (These are close to the facts presented in *In re Beugen*, 81 B.R. 994 (Bkrtcy. Ct. N.D. Cal. 1988).) This state-law counterclaim does not "ste[m] from the bankruptcy itself," it would not "necessarily be resolved in the claims allowance process," and it would require the debtor to prove damages suffered by the lessor's failures, the extent to which the landlord's representations to the housing court were untrue, and damages suffered by improper recovery of possession of the premises. Thus, under the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim.

[73] Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. Because unlike the "related" non-core state law claims that bankruptcy courts must abstain from hearing, compulsory counterclaims involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts. Because under these circumstances, a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.

[74] For these reasons, with respect, I dissent.

Notes on Stern v. Marshall

1. Are the majority and dissent arguing past each other? If, as the Chief Justice says, Vickie's bankruptcy can proceed smoothly even if a state court resolves her counterclaim against Pierce, see ¶¶ [47]-[48], why can't the same be said of *every* action by (or against) the bankrupt? In theory, those actions have distinct monetary values, analogous to accounts payable *to* the estate, or accounts receivable *by* the estate. Once those values are determined, can't the bankruptcy judge then authorize the necessary transfers of money? On the other hand, if the bankruptcy court needs to be able to resolve Vickie's counterclaim to operate efficiently, as Justice Breyer argues in his dissent, see ¶¶ [70]-[71], why can't the same be said of *every* action by (or against) the bankrupt? You may recall Justice Frankfurter addressing the general question of treating each bankruptcy as "one litigation" in *Lincoln Mills*. See *Lincoln Mills*, ¶ 29 (Frankfurter, J., dissenting).

2. As the Chief Justice acknowledges, Pierce in fact submitted a proof of claim in Vickie's bankruptcy. See ¶ [5]. By doing so, did he give *consent* for the bankruptcy court to resolve Vickie's counterclaim? If not, why not? Didn't Schor's initial *willingness* to allow the CFTC to resolve his claim play a major role in the Court's decision to uphold non-Article III jurisdiction in that case? What, if anything, differentiates *Stern* from *Schor*?

3. One assumption underlying *Stern* seems be that Article III courts and state courts provide more protection to litigants like Pierce than Article I courts. Do you agree? Under the act of 1984, bankruptcy judges are appointed to fourteen-year terms by federal circuit judges. See ¶ [10]. Does this insulate them enough from the political process? Does it perhaps insulate them *too much* from that process? Article-III judges, after all, are appointed pursuant to an obliquely political process that involves nomination by the President and confirmation by the Senate, and many state judges must stand for election. To look at this from another perspective, ask yourself what *incentives* act upon a bankruptcy judge, whether those incentives might be *distorting*, and, if so, whether you approve or disapprove of those distortions. For interesting reading on this subject, see Richard A. Posner What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1 (1993); Stephen F. Williams, Public Choice and the Judiciary: A Review of Jerry L. Mashaw's Greed, Chaos, and Governance, 73 Notre Dame L. Rev. 1599 (1998).

4. What is the actual holding of the case? May a bankruptcy court *ever* hear and resolve a counterclaim by the bankrupt against a party who submits a proof of claim? If so, what disables the bankruptcy court from adjudicating this particular claim?

5. Does Chief Justice Roberts inject new life into the doctrine of public rights, or does he merely codify what has already occurred? See ¶¶ [20], [24]-[36]. He appears to concede that cases involving such rights do not necessarily include the government as a party. See ¶ [29]. Writing separately, however, Justice Scalia disagrees. See ¶ [50].

6. Is the Chief Justice's characterization of *Murray's Lessee* accurate? See ¶ [27] (explaining *Murray's Lessee* in terms of sovereign immunity). The original proceeding was a "distress" *by* the Department of the Treasury *against* a federal collector of customs (Swartwout). Would sovereign immunity prevent someone in Swartwout's position from *defending himself* against Treasury's warrant? The more complete answer appears to be that summary process was allowed in this context, *even if* sovereign immunity would not itself have applied. For a historical explanation (along with a provocative title), see Roger W. Kirst, Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment, 126 U. Penn. L. Rev. 1281, 1301 (1978) ("The procedure considered in *Murray's Lessee* was not an American invention; it was a development from the English practice prior to 1791.").

7. In *Executive Benefits Insurance Agency v. Arkison*, 134 S.Ct. 2165 (2014), the Court held unanimously, per Justice Thomas, that a bankruptcy judge may issue proposed findings of fact and conclusions of law in any matter that would otherwise by subject to *Stern*.

(These are referred to as "*Stern* claims" in bankruptcy.) The district court would then review those proposed findings and conclusions *de novo*, thus satisfying Article III.

8. In *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015), the Court held, over a vociferous dissent by Chief Justice Roberts, that a bankruptcy court may hear a "*Stern* claim" if the parties give their consent. As Justice Sotomayor wrote for the Court:

> The lesson of [such cases as *Schor*] and the history that preceded them is plain: The entitlement to an Article III adjudicator is "a personal right" and thus ordinarily "subject to waiver," *Schor*, 478 U.S. at 848. Article III also serves a structural purpose, "barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby prevent[ing] the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 850. But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.

She went on to conclude that such authority was retained in the instant case:

> [W]e conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts. Bankruptcy judges, like magistrate judges, "are appointed and subject to removal by Article III judges," *Peretz v. United States*, 501 U.S. 923, 937 (1991). They "serve as judicial officers of the United States district court," and collectively "constitute a unit of the district court" for that district. Just as "[t]he 'ultimate decision' whether to invoke [a] magistrate [judge]'s assistance is made by the district court," *Peretz*, 501 U.S. at 937, bankruptcy courts hear matters solely on a district court's reference, which the district court may withdraw *sua sponte* or at the request of a party. "[S]eparation of powers concerns are diminished" when, as here, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains in place. *Schor*, 478 U.S. at 855.

The Chief Justice responded as follows:

> By reserving the judicial power to judges with life tenure and salary protection, Article III constitutes "an inseparable element of the constitutional system of checks and balances" — a structural safeguard that must "be jealously guarded." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 60 (1982) (plurality opinion). Today the Court lets down its guard. Despite our precedent directing that "parties cannot by consent cure" an Article III violation implicating the structural separation of powers, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986), the majority authorizes

> litigants to do just that. The Court justifies its decision largely on pragmatic grounds. I would not yield so fully to functionalism. The Framers adopted the formal protections of Article III for good reasons, and "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983).

Whose position do you find more persuasive? Why? Taken together, do *Executive Benefits* and *Wellness* render *Stern* a dead letter?

[11] Oil States Energy Services, LLC v. Greene's Energy Group, LLC
Supreme Court of the United States, No. 16-172 (Apr. 14, 2018)

JUSTICE THOMAS delivered the opinion of the Court.

[1] The Leahy-Smith America Invents Act establishes a process called "inter partes review." Under that process, the United States Patent and Trademark Office (PTO) is authorized to reconsider and to cancel an issued patent claim in limited circumstances. In this case, we address whether inter partes review violates Article III or the Seventh Amendment of the Constitution. We hold that it violates neither.

I

A

[2] Under the Patent Act, the PTO is "responsible for the granting and issuing of patents." When an inventor applies for a patent, an examiner reviews the proposed claims and the prior art to determine if the claims meet the statutory requirements. Those requirements include utility, novelty, and nonobviousness based on the prior art. The Director of the PTO then approves or rejects the application. An applicant can seek judicial review of a final rejection.

B

[3] Over the last several decades, Congress has created administrative processes that authorize the PTO to reconsider and cancel patent claims that were wrongly issued. In 1980, Congress established "*ex parte* reexamination," which still exists today. *Ex parte* reexamination permits "[a]ny person at any time" to "file a request for reexamination." If the Director determines that there is "a substantial new question of patentability" for "any claim of the patent," the PTO can reexamine the patent. The reexamination process follows the same procedures as the initial examination.

[4] In 1999, Congress added a procedure called "inter partes reexamination." Under this procedure, any person could file a request for reexamination. The Director would determine if the request raised "a substantial new question of patentability affecting any claim of the patent" and, if so, commence a reexamination. The reexamination would follow the general procedures for initial examination, but would allow the third-party requester and the patent owner to participate in a limited manner by filing responses and replies. Inter partes reexamination was phased out when the America Invents Act went into effect in 2012.

C

[5] The America Invents Act replaced inter partes reexamination with inter partes review, the procedure at issue here. Any person other than the patent owner can file a petition for

inter partes review. The petition can request cancellation of "1 or more claims of a patent" on the grounds that the claim fails the novelty or nonobviousness standards for patentability. The challenges must be made "only on the basis of prior art consisting of patents or printed publications." If a petition is filed, the patent owner has the right to file a preliminary response explaining why inter partes review should not be instituted.

[6] Before he can institute inter partes review, the Director must determine "that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged." The decision whether to institute inter partes review is committed to the Director's discretion. See *Cuozzo Speed Technologies, LLC v. Lee* (2016) (slip op. at 9). The Director's decision is "final and nonappealable."[1]

[7] Once inter partes review is instituted, the Patent Trial and Appeal Board — an adjudicatory body within the PTO created to conduct inter partes review — examines the patent's validity. The Board sits in three-member panels of administrative patent judges. During the inter partes review, the petitioner and the patent owner are entitled to certain discovery; to file affidavits, declarations, and written memoranda; and to receive an oral hearing before the Board. The petitioner has the burden of proving unpatentability by a preponderance of the evidence. The owner can file a motion to amend the patent by voluntarily canceling a claim or by "propos[ing] a reasonable number of substitute claims." The owner can also settle with the petitioner by filing a written agreement prior to the Board's final decision, which terminates the proceedings with respect to that petitioner. If the settlement results in no petitioner remaining in the inter partes review, the Board can terminate the proceeding or issue a final written decision.

[8] If the proceeding does not terminate, the Board must issue a final written decision no later than a year after it notices the institution of inter partes review, but that deadline can be extended up to six months for good cause. If the Board's decision becomes final, the Director must "issue and publish a certificate." The certificate cancels patent claims "finally determined to be unpatentable," confirms patent claims "determined to be patentable," and incorporates into the patent "any new or amended claim determined to be patentable."

[9] A party dissatisfied with the Board's decision can seek judicial review in the Court of Appeals for the Federal Circuit. Any party to the inter partes review can be a party in the Federal Circuit. The Director can intervene to defend the Board's decision, even if no party does. When reviewing the Board's decision, the Federal Circuit assesses "the Board's compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence." *Randall Mfg. v. Rea*, 733 F.3d 1355, 1362 (Fed. Cir. 2013).

II

[1] The Director has delegated his authority to the Patent Trial and Appeal Board.

[10] Petitioner Oil States Energy Services, LLC, and respondent Greene's Energy Group, LLC, are both oilfield services companies. In 2001, Oil States obtained a patent relating to an apparatus and method for protecting wellhead equipment used in hydraulic fracturing. In 2012, Oil States sued Greene's Energy in Federal District Court for infringing that patent. Greene's Energy responded by challenging the patent's validity. Near the close of discovery, Greene's Energy also petitioned the Board to institute inter partes review. It argued that two of the patent's claims were unpatentable because they were anticipated by prior art not mentioned by Oil States in its original patent application. Oil States filed a response opposing review. The Board found that Greene's Energy had established a reasonable likelihood that the two claims were unpatentable and, thus, instituted inter partes review.

[11] The proceedings before the District Court and the Board progressed in parallel. In June 2014, the District Court issued a claim-construction order. The order construed the challenged claims in a way that foreclosed Greene's Energy's arguments about the prior art. But a few months later, the Board issued a final written decision concluding that the claims were unpatentable. The Board acknowledged the District Court's contrary decision, but nonetheless concluded that the claims were anticipated by the prior art.

[12] Oil States sought review in the Federal Circuit. In addition to its arguments about patentability, Oil States challenged the constitutionality of inter partes review. Specifically, it argued that actions to revoke a patent must be tried in an Article III court before a jury. While Oil States' case was pending, the Federal Circuit issued an opinion in a different case, rejecting the same constitutional arguments. The Federal Circuit summarily affirmed the Board's decision in this case.

[13] We granted certiorari to determine whether inter partes review violates Article III or the Seventh Amendment. We address each issue in turn.

III

[14] Article III vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Consequently, Congress cannot "confer the Government's 'judicial Power' on entities outside Article III." *Stern v. Marshall*, 564 U.S. 462, 484 (2011). When determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between "public rights" and "private rights." *Executive Benefits Ins. Agency v. Arkison* (2014) (slip op. at 6). Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts. See *id.*; *Stern*, 564 U.S. at 488-92.

[15] This Court has not "definitively explained" the distinction between public and private rights, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982), and its precedents applying the public-rights doctrine have "not been entirely consistent," *Stern*,

564 U.S. at 488. But this case does not require us to add to the "various formulations" of the public-rights doctrine. *Id.* Our precedents have recognized that the doctrine covers matters "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50 (1932). In other words, the public-rights doctrine applies to matters "'arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.'" *Id.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). Inter partes review involves one such matter: reconsideration of the Government's decision to grant a public franchise.

A

[16] Inter partes review falls squarely within the public-rights doctrine. This Court has recognized, and the parties do not dispute, that the decision to grant a patent is a matter involving public rights — specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration. Thus, the PTO can do so without violating Article III.

1

[17] This Court has long recognized that the grant of a patent is a "'matte[r] involving public rights.'" *United States v. Duell*, 172 U.S. 576, 582-583 (1899) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)). It has the key features to fall within this Court's longstanding formulation of the public-rights doctrine.

[18] *Ab initio*, the grant of a patent involves a matter "arising between the government and others." *Ex parte Bakelite Corp.*, 279 U.S. at 451. As this Court has long recognized, the grant of a patent is a matter between "'the public, who are the grantors, and . . . the patentee.'" *Duell*, 172 U.S. at 586 (quoting *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 59 (1884)). By "issuing patents," the PTO "take[s] from the public rights of immense value, and bestow[s] them upon the patentee." *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370 (1888). Specifically, patents are "public franchises" that the Government grants "to the inventors of new and useful improvements." *Seymour v. Osborne*, 78 U.S. (11 Wall.) 516, 533 (1871); accord, *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 63-64 (1998). The franchise gives the patent owner "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States." 35 U.S.C. § 154(a)(1). That right "did not exist at common law." *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1851). Rather, it is a "creature of statute law." *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24, 40 (1923).

[19] Additionally, granting patents is one of "the constitutional functions" that can be carried out by "the executive or legislative departments" without "'judicial determination.'" *Crowell*, 285 U.S. at 50-51 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 452). Article I gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress can grant patents itself by statute. See, *e.g.*, *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 548-50 (1853). And, from the founding to today, Congress has authorized the Executive Branch to grant patents that meet the statutory requirements for patentability. When the PTO "adjudicate[s] the patentability of inventions," it is "exercising the executive power." *Freytag v. Commissioner*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in judgment) (emphasis deleted).

[20] Accordingly, the determination to grant a patent is a "matte[r] involving public rights." *Murray's Lessee*, 59 U.S. at 284. It need not be adjudicated in Article III court.

2

[21] Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line.

[22] Inter partes review is "a second look at an earlier administrative grant of a patent." *Cuozzo* (2016) (slip op. at 16). The Board considers the same statutory requirements that the PTO considered when granting the patent. Those statutory requirements prevent the "issuance of patents whose effects are to remove existent knowledge from the public domain." *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966). So, like the PTO's initial review, the Board's inter partes review protects "the public's paramount interest in seeing that patent monopolies are kept within their legitimate scope," *Cuozzo* (2016) (slip op. at 16) (internal quotation marks and alterations omitted). Thus, inter partes review involves the same interests as the determination to grant a patent in the first instance. See *Duell*, 172 U.S. at 586.

[23] The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs after the patent has issued. But that distinction does not make a difference here. Patent claims are granted subject to the qualification that the PTO has "the authority to reexamine — and perhaps cancel — a patent claim" in an inter partes review. See *Cuozzo* (2016) (slip op. at 3). Patents thus remain "subject to [the Board's] authority" to cancel outside of an Article III court. *Crowell*, 285 U.S. at 50.

[24] This Court has recognized that franchises can be qualified in this manner. For example, Congress can grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the franchise. See, *e.g.*, *Louisville Bridge Co. v. United States*, 242 U.S. 409, 421 (1917) (collecting cases). Even after the bridge is built, the Government can exercise its reserved authority through legislation or an administrative proceeding. See, *e.g.*, *id.*, at 420-21; *Hannibal Bridge Co. v. United States*, 221 U.S. 194, 205 (1911); *Bridge Co. v. United States*, 105 U.S. 470, 478-82 (1882). The same is true for franchises that permit companies to build railroads or telegraph lines. See, *e.g.*, *United States v. Union Pacific R. Co.*, 160 U.S. 1, 24-25, 37-38 (1895).

[25] Thus, the public-rights doctrine covers the matter resolved in inter partes review. The Constitution does not prohibit the Board from resolving it outside of an Article III court.

B

[26] Oil States challenges this conclusion, citing three decisions that recognize patent rights as the "private property of the patentee." *American Bell Telephone Co.*, 128 U.S. at 370; see also *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609 (1898) ("[A granted patent] has become the property of the patentee"); *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 197 (1857) ("[T]he rights of a party under a patent are his private property"). But those cases do not contradict our conclusion.

[27] Patents convey only a specific form of property right — a public franchise. See *Pfaff*, 525 U.S. at 63-64. And patents are "entitled to protection as any other property, *consisting of a franchise*." *Seymour*, 78 U.S. at 533 (emphasis added). As a public franchise, a patent can confer only the rights that "the statute prescribes." *Gayler*, 51 U.S. at 494; *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663-64 (1834) (noting that Congress has "the power to prescribe the conditions on which such right shall be enjoyed"). It is noteworthy that one of the precedents cited by Oil States acknowledges that the patentee's rights are "derived altogether" from statutes, "are to be regulated and measured by these laws, and cannot go beyond them." *Brown*, 60 U.S. at 195.

[28] One such regulation is inter partes review. The Patent Act provides that, "[s]ubject to the provisions of this title, patents shall have the attributes of personal property." This provision qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006). Those provisions include inter partes review.

[29] Nor do the precedents that Oil States cites foreclose the kind of post-issuance administrative review that Congress has authorized here. To be sure, two of the cases make broad declarations that "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." *McCormick Harvesting Machine Co.*, 169 U.S. at 609; accord, *American Bell Telephone Co.*, 128 U.S. at 364. But those cases were decided under the Patent Act of 1870. That version of the Patent Act did not include any provision for post-issuance administrative review. Those precedents, then, are best read as a description of the statutory scheme that existed at that time. They do not resolve Congress' authority under the Constitution to establish a different scheme.[3]

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[3]The dissent points to *McCormick*'s statement that the Patent Office Commissioner could not invalidate the patent at issue because it would "'deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch.'" (Quoting *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 612 (1898).) But that statement followed naturally from the Court's determination that, under the Patent Act of 1870, the

C

[30] Oil States and the dissent contend that inter partes review violates the "general" principle that "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 59 U.S. at 284). They argue that this is so because patent validity was often decided in English courts of law in the 18th century. For example, if a patent owner brought an infringement action, the defendant could challenge the validity of the patent as an affirmative defense. See Lemley, Why Do Juries Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1682, 1685-86 & n.52 (2013). Or, an individual could challenge the validity of a patent by filing a writ of *scire facias* [roughly translated, show cause] in the Court of Chancery, which would sit as a law court when adjudicating the writ. See *id.* at 1683-85 & n.44; Bottomley, Patent Cases in the Court of Chancery, 1714-58, 35 J. Legal Hist. 27, 36-37, 41-43 (2014).

[31] But this history does not establish that patent validity is a matter that, "from its nature," must be decided by a court. *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 59 U.S. at 284). The aforementioned proceedings were between private parties. But there was another means of canceling a patent in 18th-century England, which more closely resembles inter partes review: a petition to the Privy Council to vacate a patent. See Lemley, 99 Va. L. Rev. at 1681-82; Hulme, Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794, 33 L.Q. Rev. 63 (1917). The Privy Council was composed of the Crown's advisers. Lemley, 99 Va. L. Rev. at 1681. From the 17th through the 20th centuries, English patents had a standard revocation clause that permitted six or more Privy Counsellors to declare a patent void if they determined the invention was contrary to law, "prejudicial" or "inconvenient," not new, or not invented by the patent owner. See 11 W. Holdsworth, A History of English Law 426-27 & n.6 (1938); Davies, The Early History of the Patent Specification, 50 L.Q. Rev. 86, 102-06 (1934). Individuals could petition the Council to revoke a patent, and the petition was referred to the Attorney General. The Attorney General examined the petition, considered affidavits from

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Commissioner "was *functus officio* [*i.e.*, he was an officer whose mandate had expired]" and "had no power to revoke, cancel, or annul" the patent at issue. 169 U.S. at 611-12.

Nor is it significant that the *McCormick* Court "equated invention patents with land patents." *McCormick* itself makes clear that the analogy between the two depended on the particulars of the Patent Act of 1870. Modern invention patents, by contrast, are meaningfully different from land patents. The land-patent cases invoked by the dissent involved a "transaction [in which] 'all authority or control' over the lands has passed from 'the Executive Department.'" *Boesche v. Udall*, 373 U.S. 472, 477 (1963) (quoting *Moore v. Robbins*, 96 U.S. 530, 533 (1878)). Their holdings do not apply when "the Government continues to possess some measure of control over" the right in question. *Boesche*, 373 U.S. at 477; see *id.* at 477-78 (affirming administrative cancellations of public-land leases). And that is true of modern invention patents under the current Patent Act, which gives the PTO continuing authority to review and potentially cancel patents after they are issued.

the petitioner and patent owner, and heard from counsel. See, *e.g.*, *Bull v. Lydall*, PC2/81, at 180-81 (1706). Depending on the Attorney General's conclusion, the Council would either void the patent or dismiss the petition. See, *e.g.*, *Darby v. Betton*, PC2/99, at 358-59 (1745-1746) (voiding the patent); *Baker v. James*, PC2/103, at 320-21, 346-47 (1752) (dismissing the petition).

[32] The Privy Council was a prominent feature of the English system. It had exclusive authority to revoke patents until 1753, and after that, it had concurrent jurisdiction with the courts. See Hulme, 33 L.Q. Rev. at 189-91, 193-94. The Privy Council continued to consider revocation claims and to revoke patents throughout the 18th century. Its last revocation was in 1779. See *id.* at 192-93. It considered, but did not act on, revocation claims in 1782, 1794, and 1810. See *id.*; *Board of Ordinance v. Parr*, PC1/3919 (1810).

[33] The Patent Clause in our Constitution "was written against the backdrop" of the English system. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966). Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council. The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware of this common practice. Nor is there any reason to think they excluded this practice during their deliberations. And this Court has recognized that, "[w]ithin the scope established by the Constitution, Congress may set out conditions and tests for patentability." *Id.* at 6. We conclude that inter partes review is one of those conditions.[4]

[34] For similar reasons, we disagree with the dissent's assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. Historical practice is not decisive here because matters governed by the public-rights doctrine "from their nature" can be resolved in multiple ways: Congress can "reserve to itself the power to decide," "delegate that power to executive officers," or "commit it to judicial tribunals." *Ex parte Bakelite Corp.*, 279 U.S. at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today.

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[4]Oil States also suggests that inter partes review could be an unconstitutional condition because it conditions the benefit of a patent on accepting the possibility of inter partes review. *Cf. Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right" (internal quotation marks omitted)). Even assuming a patent is a "benefit" for purposes of the unconstitutional-conditions doctrine, that doctrine does not apply here. The doctrine prevents the Government from using conditions "to produce a result which it could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation marks and alterations omitted). But inter partes review is consistent with Article III, and falls within Congress' Article I authority, so it is something Congress can "command directly," *Perry*, 408 U.S. at 597.

D

[35] Finally, Oil States argues that inter partes review violates Article III because it shares "every salient characteristic associated with the exercise of the judicial power." Oil States highlights various procedures used in inter partes review: motion practice before the Board; discovery, depositions, and cross-examination of witnesses; introduction of evidence and objections based on the Federal Rules of Evidence; and an adversarial hearing before the Board. Similarly, Oil States cites PTO regulations that use terms typically associated with courts — calling the hearing a "trial"; the Board members "judges"; and the Board's final decision a "judgment."

[36] But this Court has never adopted a "looks like" test to determine if an adjudication has improperly occurred outside of an Article III court. The fact that an agency uses court-like procedures does not necessarily mean it is exercising the judicial power. See *Freytag*, 501 U.S. at 910 (opinion of Scalia, J.). This Court has rejected the notion that a tribunal exercises Article III judicial power simply because it is "called a court and its decisions called judgments." *Williams v. United States*, 289 U.S. 553, 563 (1933). Nor does the fact that an administrative adjudication is final and binding on an individual who acquiesces in the result necessarily make it an exercise of the judicial power. See, *e.g.*, *Murray's Lessee*, 59 U.S. at 280-81 (permitting the Treasury Department to conduct "final and binding" audits outside of an Article III court). Although inter partes review includes some of the features of adversarial litigation, it does not make any binding determination regarding "the liability of [Greene's Energy] to [Oil States] under the law as defined." *Crowell*, 285 U.S. at 51. It remains a matter involving public rights, one "between the government and others, which from [its] nature do[es] not require judicial determination." *Ex parte Bakelite Corp.*, 279 U.S. at 451.[5]

E

[37] We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. And because the Patent Act provides for judicial

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[5]Oil States also points out that inter partes review "is initiated by private parties and implicates no waiver of sovereign immunity." But neither of those features takes inter partes review outside of the public-rights doctrine. That much is clear from *United States v. Duell*, 172 U.S. 576 (1899), which held that the doctrine covers interference proceedings — a procedure to "determin[e] which of two claimants is entitled to a patent" — even though interference proceedings were initiated by "'private interests compet[ing] for preference'" and did not involve a waiver of sovereign immunity. *Id.* at 582, 586 (quoting *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 59 (1884)). Also, inter partes review is not initiated by private parties in the way that a common-law cause of action is. To be sure, a private party files the petition for review. But the decision to institute review is made by the Director and committed to his unreviewable discretion. See *Cuozzo Speed Technologies, LLC v. Lee* (2016) (slip op. at 9).

review by the Federal Circuit, we need not consider whether inter partes review would be constitutional "without any sort of intervention by a court at any stage of the proceedings," *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455, n.13 (1977). Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. See, *e.g.*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642 (1999); *James v. Campbell*, 104 U.S. 356, 358 (1882).

IV

[38] In addition to Article III, Oil States challenges inter partes review under the Seventh Amendment. The Seventh Amendment preserves the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, "the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989); accord, *Atlas Roofing Co.*, 430 U.S. at 450-55. No party challenges or attempts to distinguish those precedents. Thus, our rejection of Oil States' Article III challenge also resolves its Seventh Amendment challenge. Because inter partes review is a matter that Congress can properly assign to the PTO, a jury is not necessary in these proceedings.

V

[39] Because inter partes review does not violate Article III or the Seventh Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring.

[40] I join the Court's opinion in full. The conclusion that inter partes review is a matter involving public rights is sufficient to show that it violates neither Article III nor the Seventh Amendment. But the Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies. Our precedent is to the contrary. *Stern v. Marshall*, 564 U.S. 462, 494 (2011); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853-56 (1986); see also *Stern*, 564 U.S. at 513 (BREYER, J., dissenting) ("The presence of 'private rights' does not automatically determine the outcome of the question but requires a more 'searching' examination of the relevant factors").

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE joins, dissenting.

[41] After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing that it was all a mistake and your patent should be canceled? Can a political appointee and his administrative agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.

[42] We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn't always so. Before the Revolution, colonial judges depended on the crown for their tenure and salary and often enough their decisions followed their interests. The problem was so serious that the founders cited it in their Declaration of Independence. Once free, the framers went to great lengths to guarantee a degree of judicial independence for future generations that they themselves had not experienced. Under the Constitution, judges "hold their Offices during good Behaviour" and their "Compensation . . . shall not be diminished during the[ir] Continuance in Office." The framers knew that "a fixed provision" for judges' financial support would help secure "the independence of the judges," because "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79 (A. Hamilton) (emphasis deleted). They were convinced, too, that "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence." The Federalist No. 78 (A. Hamilton).

[43] Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right — no less than a home or farm — that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job. Supporters say this is a good thing because the Patent Office issues too many low quality patents; allowing a subdivision of that office to clean up problems after the fact, they assure us, promises an efficient solution. And, no doubt, dispensing with constitutionally prescribed procedures is often expedient. Whether it is the guarantee of a warrant before a search, a jury trial before a conviction — or, yes, a judicial hearing before a property interest is stripped away — the Constitution's constraints can slow things down. But economy supplies no license for ignoring these — often vitally inefficient — protections. The Constitution "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and it is not our place to replace that judgment with our own. *United States v. Stevens*, 559 U.S. 460, 470 (2010) [a case involving freedom of speech].

[44] Consider just how efficient the statute before us is. The Director of the Patent Office is a political appointee who serves at the pleasure of the President. He supervises and pays the Board members responsible for deciding patent disputes. The Director is allowed to

select which of these members, and how many of them, will hear any particular patent challenge. If they (somehow) reach a result he does not like, the Director can add more members to the panel — including himself — and order the case reheard. See *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F.3d 1013, 1020 (Fed. Cir. 2013) (Dyk, J., concurring), cert. pending, No. 17-751. Nor has the Director proven bashful about asserting these statutory powers to secure the "'policy judgments'" he seeks. Brief for Petitioner 46 (quoting Patent Office Solicitor); see also Brief for Shire Pharmaceuticals LLC as *Amicus Curiae* 22-30.

[45] No doubt this efficient scheme is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable? Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?

[46] Of course, all this invites the question: how do we know which cases independent judges must hear? The Constitution's original public meaning supplies the key, for the Constitution cannot secure the people's liberty any less today than it did the day it was ratified. The relevant constitutional provision, Article III, explains that the federal "judicial Power" is vested in independent judges. As originally understood, the judicial power extended to "suit[s] at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). From this and as we've recently explained, it follows that, "[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with" Article III judges endowed with the protections for their independence the framers thought so important. *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (internal quotation marks omitted). The Court does not quarrel with this test. We part ways only on its application.[1]

[47] As I read the historical record presented to us, only courts could hear patent challenges in England at the time of the founding. If facts were in dispute, the matter first had to proceed in the law courts. See, *e.g.*, *Newsham v. Gray*, 26 Eng. Rep. 575 (Ch. 1742). If successful there, a challenger then had to obtain a writ of *scire facias* in the law side of the Court of Chancery. See, *e.g.*, Pfander, Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals, 78 Texas L. Rev. 1433, 1446, n.53 (2000); Lemley, Why Do Juries

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[1]Some of our concurring colleagues see it differently. See *ante* (BREYER, J., concurring). They point to language in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), promoting the notion that the political branches may "depart from the requirements of Article III" when the benefits outweigh the costs. *Id.* at 851. Color me skeptical. The very point of our written Constitution was to prevent the government from "depart[ing]" from its protections for the people and their liberty just because someone later happens to think the costs outweigh the benefits. See *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1686-87 (2013). The last time an executive body (the King's Privy Council) invalidated an invention patent on an ordinary application was in 1746, in *Darby v. Betton*, PC2/99, at 358-59; and the last time the Privy Council even considered doing so was in 1753, in *Baker v. James*, PC2/103, at 320-21. After *Baker v. James*, the Privy Council "divest[ed] itself of its functions" in ordinary patent disputes, Hulme, Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794 (Pt. II), 33 L.Q. Rev. 180, 194 (1917), which "thereafter [were] adjudicated solely by the law courts, as opposed to the [crown's] prerogative courts," Mossoff, Rethinking the Development of Patents: An Intellectual History, 1550-1800, 52 Hastings L.J. 1255, 1286-87 (2001).

[48] This shift to courts paralleled a shift in thinking. Patents began as little more than feudal favors. Mossof, 52 Hastings L.J. at 1261. The crown both issued and revoked them. Lemley, 99 Va. L. Rev. at 1680-81. And they often permitted the lucky recipient the exclusive right to do very ordinary things, like operate a toll bridge or run a tavern. *Id.* But by the 18th century, inventors were busy in Britain and invention patents came to be seen in a different light. They came to be viewed not as endowing accidental and anticompetitive monopolies on the fortunate few but as a procompetitive means to secure to individuals the fruits of their labor and ingenuity; encourage others to emulate them; and promote public access to new technologies that would not otherwise exist. Mossoff, 52 Hastings L.J. at 1288-89. The Constitution itself reflects this new thinking, authorizing the issuance of patents precisely because of their contribution to the "Progress of Science and useful Arts." "In essence, there was a change in perception — from viewing a patent as a contract between the crown and the patentee to viewing it as a 'social contract' between the patentee and society." Waltersheid, The Early Evolution of the United States Patent Law: Antecedents (Part 3), 77 J. Pat. & T. Off. Soc. 771, 793 (1995). And as invention patents came to be seen so differently, it is no surprise courts came to treat them more solicitously.[3]

[49] Unable to dispute that judges alone resolved virtually all patent challenges by the time of the founding, the Court points to three English cases that represent the Privy Council's dying gasp in this area: *Board of Ordnance v. Wilkinson*, PC2/123 (1779); *Grill [Grice] v. Waters*, PC2/127 (1782); and *Board of Ordnance v. Parr*, PC1/3919 (1810).[4] Filed in 1779,

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[3]See also, *e.g.*, Mossoff, Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context, 92 Cornell L. Rev. 953, 967-68 (2007) ("[A]n American patent in the late eighteenth century was radically different from the royal monopoly privilege dispensed by Queen Elizabeth or King James in the early seventeenth century. Patents no longer created, and sheltered from competition, manufacturing monopolies — they secured the exclusive control of an inventor over his novel and useful scientific or mechanical invention" (footnote omitted)).

[4]The 1794 petition the Court invokes involved a Scottish patent. *Simpson v. Cunningham*, PC2/141, at 88 (1794). The English and Scottish patents systems, however, were distinct and enforced by different regimes. Gómez-Arostegui, Patent and Copyright Exhaustion

1782, and 1810, each involved an effort to override a patent on munitions during wartime, no doubt in an effort to increase their supply. But even then appealing to the Privy Council was seen as a last resort. The 1779 petition (the last Privy Council revocation ever) came only after the patentee twice refused instructions to litigate the patent's validity in a court of law. The Council did not act on the 1782 petition but instead referred it to the Attorney General where it appears to have been abandoned. Meanwhile, in response to the 1810 petition the Attorney General admitted that *scire facias* was the "usual manner" of revoking a patent and so directed the petitioner to proceed at law even as he suggested the Privy Council might be available in the event of a "very pressing and imminent" danger to the public. Gómez-Arostegui & Bottomley, Privy Council and Scire Facias 1700-1883 at 20 (2017).

[50] In the end, these cases do very little to support the Court's holding. At most, they suggest that the Privy Council might have possessed some residual power to revoke patents to address wartime necessities. Equally, they might serve only as more unfortunate evidence of the maxim that in time of war, the laws fall silent.[5] But whatever they do, these cases do not come close to proving that patent disputes were routinely permitted to proceed outside a court of law.

[51] Any lingering doubt about English law is resolved for me by looking to our own. While the Court is correct that the Constitution's Patent Clause "'was written against the backdrop'" of English practice (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966)), it's also true that the Clause sought to reject some of early English practice. Reflecting the growing sentiment that patents shouldn't be used for anticompetitive monopolies over "goods or businesses which had long before been enjoyed by the public," the framers wrote the Clause to protect only procompetitive invention patents that are the product of hard work and insight and "add to the sum of useful knowledge." *Id.* at 5-6. In light of the Patent Clause's restrictions on this score, courts took the view that when the federal government "grants a patent the grantee is entitled to it *as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." *James v. Campbell*, 104 U.S. 356, 358 (1882) (emphasis added). As Chief Justice Marshall explained, courts treated American invention patents as recognizing an "inchoate property" that exists "from the moment of invention." *Evans v. Jordan*, 8 F. Cas. 872, 873 (No. 4,564) (CC Va. 1813). American patent holders thus were thought to "hol[d] a property in [their] invention[s] by as good a title as the farmer holds his farm and flock." *Hovey v. Henry*, 12 F. Cas. 603, 604 (No. 6,742) (CC Mass. 1846) (Woodbury, J.).

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in England Circa 1800, at 10-16, 37, 49-50 (Feb. 9, 2017). Besides, even in that case the Scottish Lord Advocate "'was of opinion, that the question should be tried in a court of law.'" Gómez-Arostegui & Bottomley, Addendum at 23.

[5] After all, the English statute of monopolies appeared to require the "force and validitie" of all patents to be determined only by "the Comon Lawes of this Realme & not otherwise." 21 Jac. 1, c. 3, §2 (1624). So the Privy Council cases on which the Court relies may not reflect the best understanding of the British constitution.

And just as with farm and flock, it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges.

[52] This view held firm for most of our history. In fact, from the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone. The only apparent exception to this rule cited to us was a 4 year period when *foreign* patentees had to "work" or commercialize their patents or risk having them revoked. Hovenkamp, The Emergence of Classical American Patent Law, 58 Ariz. L. Rev. 263, 283-84 (2016). And the fact that for almost 200 years "earlier Congresses avoided use of [a] highly attractive" — and surely more efficient — means for extinguishing patents should serve as good "reason to believe that the power was thought not to exist" at the time of the founding. *Printz v. United States*, 521 U.S. 898, 905 (1997).

[53] One more episode still underscores the point. When the Executive sought to claim the right to cancel a patent in the 1800s, this Court firmly rebuffed the effort. The Court explained:

> It has been settled by repeated decisions of this court that when a patent has [been issued by] the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. It has become the property of the patentee, and as such is entitled to the same legal protection as other property.

McCormick Harvesting Machine Co. v. Aultman, 169 U.S. 606, 608-09 (1898). As a result, the Court held, "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." *Id.* at 609.

[54] The Court today replies that McCormick sought only to interpret certain statutes then in force, not the Constitution. But this much is hard to see. Allowing the Executive to withdraw a patent, *McCormick* said, "would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive." 169 U.S. at 612. *McCormick* also pointed to "repeated decisions" in similar cases that themselves do not seem to rest merely on statutory grounds. See *id.* at 608-09 (citing *United States v. Schurz*, 102 U.S. 378 (1880), and *United States v. American Bell Telephone Co.*, 128 U.S. 315 (1888)). And *McCormick* equated invention patents with land patents. 169 U.S. at 609. That is significant because, while the Executive has always dispensed public lands to homesteaders and other private persons, it has never been constitutionally empowered to withdraw land patents from their recipients (or their successors-in-interest) except through a "judgment of a court." *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535 (1865); *Wellness Int'l Network, Ltd. v. Sharif* (2015) (THOMAS, J., dissenting) (slip op. at 11) ("Although Congress could authorize executive agencies to dispose of public rights in lands — often by means of

adjudicating a claimant's qualifications for a land grant under a statute — the United States had to go to the courts if it wished to revoke a patent" (emphasis deleted)).

[55] With so much in the relevant history and precedent against it, the Court invites us to look elsewhere. Instead of focusing on the revocation of patents, it asks us to abstract the level of our inquiry and focus on their issuance. Because the job of issuing invention patents traditionally belonged to the Executive, the Court proceeds to argue, the job of revoking them can be left there too. But that doesn't follow. Just because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it. To reward those who had proven the social utility of their work (and to induce others to follow suit), the law long afforded patent holders more protection than that against the threat of governmental intrusion and dispossession. The law requires us to honor those historical rights, not diminish them.

[56] Still, the Court asks us to look away in yet another direction. At the founding, the Court notes, the Executive could sometimes both dispense and revoke public franchises. And because, it says, invention patents are a species of public franchises, the Court argues the Executive should be allowed to dispense and revoke them too. But labels aside, by the time of the founding the law treated patents protected by the Patent Clause quite differently from ordinary public franchises. Many public franchises amounted to little more than favors resembling the original royal patents the framers expressly refused to protect in the Patent Clause. The Court points to a good example: the state-granted exclusive right to operate a toll bridge. By the founding, courts in this country (as in England) had come to view anticompetitive monopolies like that with disfavor, narrowly construing the rights they conferred. See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837). By contrast, courts routinely applied to invention patents protected by the Patent Clause the "liberal common sense construction" that applies to other instruments creating private property rights, like land deeds. *Davis v. Palmer*, 7 F. Cas. 154, 158 (No. 3,645) (CC Va. 1827) (Marshall, C.J.). As Justice Story explained, invention patents protected by the Patent Clause were "not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored." *Ames v. Howard*, 1 F. Cas. 755, 756 (No. 326) (CC Mass. 1833). For precisely these reasons and as we've seen, the law traditionally treated patents issued under the Patent Clause very differently than monopoly franchises when it came to governmental invasions. Patents alone required independent judges. Nor can simply invoking a mismatched label obscure that fact. The people's historic rights to have independent judges decide their disputes with the government should not be a "constitutional Maginot Line, easily circumvented" by such "simpl[e] maneuver[s]." *Bank Markazi v. Peterson* (2016) (ROBERTS, C. J., dissenting) (slip op. at 12).

[57] Today's decision may not represent a rout but it at least signals a retreat from Article III's guarantees. Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and

tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It's for that reason Hamilton warned the judiciary to take "all possible care . . . to defend itself against" intrusions by the other branches. The Federalist No. 78. It's for that reason I respectfully dissent.

Notes on Oil States

1. How would you have resolved this case? Why?

2. Who has the better side of the argument that patents constitute a classic form of property, such that they government may only revoke them through the agency of a conventional court? Writing for the majority, Justice Thomas analogizes them to a "franchise" that can be revoked for a variety of reasons, most particularly on the basis of a statutory reservation. See ¶ [27]. Writing in dissent, Justice Gorsuch argues that patents are conceptually unlike the kind of franchises that Justice Thomas describes. See ¶ [56]. Whose account makes more sense to you? Why?

[12-13] **Louisville & Nashville R. Co. v. Mottley**
211 U.S. 149 (1908)

[1] The appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the circuit court of the United States for the western district of Kentucky against the appellant, a railroad company and a citizen of the same state. The object of the suit was to compel the specific performance of the following contract:

Louisville, Ky., Oct. 2d, 1871

> The Louisville & Nashville Railroad Company, in consideration that E.L. Mottley and wife, Annie E. Mottley, have this day released Company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph's Station, Jefferson County, Kentucky, hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E.L. & Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them.

[2] The bill alleged that . . . . the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal to comply with the contract was based solely upon that part of the act of Congress of June 29, 1906, which forbids the giving of free passes or free transportation.

[3] [Editor's new paragraph.] The bill further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that, if the law is to be construed as prohibiting such passes, it is in conflict with the 5th Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill. The judge of the circuit court overruled the demurrer, entered a decree for the relief prayed for, and the defendant appealed directly to this court.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court:

[4] Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906, which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons, who in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the

railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in violation of the Fifth Amendment of the Constitution of the United States.

[5] [Editor's new paragraph.] We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion.

[6] There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit . . . arising under the Constitution and laws of the United States." Act of August 13, 1888. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

[7] [Editor's new pargraph.] In *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894), the plaintiff, the State of Tennessee, brought suit in the Circuit Court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the State. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United States, which forbids any State from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Gray, "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."

[8] [Editor's new paragraph.] Again, in *Boston & Montana Consolidated Copper & Silver Mining Company v. Montana Ore Purchasing Company*, 188 U.S. 632 (1903), the plaintiff brought suit in the Circuit Court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the Circuit Court . . . .

[9] The interpretation of the act which we have stated was first announced in *Metcalf v. Watertown*, 128 U.S. 586 (1888), and has since been repeated and applied in [many cases]. The application of this rule to the case at bar is decisive against the jurisdiction of the Circuit Court.

[10] It is ordered that the

Judgment be reversed and the case remitted to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

Notes on Mottley

1. Would you interpret what is now 28 U.S.C. § 1331 to include the Well-Pleaded Complaint Rule? Why or why not? As you can see, the language of the statute is virtually identical to the language of the Constitution. Would you interpret the Constitution to include this rule? If not, how would you justify the distinction?

2. Although the Well-Pleaded Complaint Rule is generally attributed to *Mottley*, as you can see, the Court relief on a line of cases that went back to 1888. See *Metcalf v. Watertown*, 128 U.S. 586 (1888), cited in ¶ [9] of *Mottley*.

3. As Justice Brennan observed long after *Mottley*, federal courts routinely consulted the *answer* to ascertain whether a case "arose under" the laws of the United States between 1875, when Congress first enacted what is now 28 U.S.C. § 1331, and 1888, when Congress finalized the amendatory legislation cited in *Mottley*. See *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1 (1983). "[U]ntil the 1887 amendments to the 1875 Act, as amended by Act of Aug. 13, 1888," wrote Justice Brennan in *Franchise Tax Board*, "the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." 483 U.S. at 10-11 n. 9 (citations deleted).

4. Did *Mottley* actually *satisfy* the Well-Pleaded Complaint Rule? You may have noted that the Mottleys asked for a form of equitable relief — specific enforcement of their contract. We can concede that the elements of an action *at law* for breach would not include any reference to an anticipated defense, but can the same be said of an action *in equity*? Are the elements identical? Much the same can be asked about *Boston & Montana Consolidated Copper & Silver Mining Company v. Montana Ore Purchasing Company*, 188 U.S. 632 (1903), another case on which the Court relied. This case as well included an equitable claim, although there the plaintiff asked for both legal and equitable relief. See ¶ [8].

American Well Works Co. v. Layne & Bowler Co.
241 U.S. 257 (1916)

ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ARKANSAS

MR. JUSTICE HOLMES delivered the opinion of the Court.

[1] This is a suit begun in a state court, removed to the United States court, and then, on motion to remand by the plaintiff, dismissed by the latter court, on the ground that the cause of action arose under the patent laws of the United States, that the state court had no jurisdiction, and that therefore the one to which it was removed had none.[a] There is a proper certificate and the case comes here direct from the district court.

[2] Of course the question depends upon the plaintiff's declaration. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). That may be summed up in a few words. The plaintiff alleges that it owns, manufactures, and sells a certain pump, has or has applied for a patent for it, and that the pump is known as the best in the market. It then alleges that the defendants have falsely and maliciously libeled and slandered the plaintiff's title to the pump by stating that the pump and certain parts thereof are infringements upon the defendant's pump and certain parts thereof, and that without probable cause they have brought suits against some parties who are using the plaintiff's pump, and that they are threatening suits against all who use it. The allegation of the defendants' libel or slander is repeated in slightly varying form, but it all comes to statements to various people that the plaintiff was infringing the defendants' patent, and that the defendant would sue both seller and buyer if the plaintiff's pump was used. Actual damage to the plaintiff in its business is alleged to the extent of $50,000, and punitive damages to the same amount are asked.

[3] It is evident that the claim for damages is based upon conduct; or, more specifically, language, tending to persuade the public to withdraw its custom [*i.e.*, business] from the plaintiff, and having that effect to its damage. Such conduct, having such effect, is equally actionable whether it produces the result by persuasion, by threats, or by falsehood, and it is enough to allege and prove the conduct and effect, leaving the defendant to justify if he can. If the conduct complained of is persuasion, it may be justified by the fact that the defendant is a competitor, or by good faith and reasonable grounds. If it is a statement of fact, it may be justified, absolutely or with qualifications, by proof that the statement is true. But all such justifications are defenses, and raise issues that are no part of the plaintiff's case. In the present instance it is part of the plaintiff's case that it had a business to be damaged; whether built up by patents or without them

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[a]Editor's note: At one time, if a plaintiff brought an action in state court that lay within the exclusive jurisdiction of the federal courts, removal was impossible, because jurisdiction could not attach in the state court in the first place. Instead, the plaintiff had to bring an original action in federal court. The process no longer works this way.

does not matter. It is no part of it to prove anything concerning the defendants' patent, or that the plaintiff did not infringe the same — still less to prove anything concerning any patent of its own. . . . .

[4] A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact, — that the defendant has a patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. If the state adopted for civil proceedings the saying of the old criminal law: the greater the truth, the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defense if the statement was made from disinterested malevolence. The state is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States.

Judgment reversed.

[5] MR. JUSTICE MCKENNA dissents, being of opinion that the case involves a direct and substantial controversy under the patent laws.

Notes on Well Works

1. The *Well Works* test is widely praised — even by its critics — as an easy one to administer. Is that an adequate reason for courts to adopt it?

2. As you will see in upcoming cases, *Well Works* is *not* the final test for determining whether a case "arises under" the laws of the United States. It is, however, considered a powerful test of "inclusion." That is, just about any case that satisfies *Well Works* will be deemed to "arise under" federal law. By the same token, however, *Well Works* is considered a relatively poor test of "exclusion." In other words, federal courts will often hear cases that fail *Well Works* — that is, where the plaintiff's cause of action is *not* federal.

3. There is one case that is conventionally described as *not* satisfying § 1331, yet satisfying *Well Works*. See *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900). *Shoshone Mining* involved a federal statute that arguably authorized people to attack federal mining patents. Despite this arguable authorization, which would have brought the case within *Well Works*, the Court held that federal jurisdiction was not available. Commentators have generally defended *Shoshone Mining* as a case about practical considerations. The issues in such cases

would be idiosyncratic and local, the federal interest in proper resolution would be minor, and federal courts were typically located many days' travel from mines in the old West. See William Cohen, "The Broken Compass: The Requirement That a Case Arise 'Directly' under Federal Law," 115 U. Pa. L. Rev. 890 (1967). John Oakley has cast doubt on conventional wisdom on *Shoshone*, however, suggesting that the federal statute at issue in that case merely *held up* a federal patent while it could be attacked in some other court of competent jurisdiction. See John B. Oakley, "Federal Jurisdiction and the Problem of the Litigative Unit: When Does What 'Arise Under' Federal Law?," 76 Tex. L. Rev. 1829, 1841 n. 63 (1998).

4. *Well Works* is conventionally read as an interpretation of what is now 28 U.S.C. § 1331. In other words, it is read as a case of *statutory interpretation*. Does Justice Holmes read it that way? Does he appear to limit his analysis to the statute, or could he just as easily be writing about the Constitution? If you find *Well Works* persuasive, would you constitutionalize it? If so, what would you do with a case like *Osborn*, where the cause of action was not federal, but where a federal issue would ultimately resolve the case? Would you exclude that case from the federal courts? Would you allow it into the federal judiciary only by way of appeal to the Supreme Court of the United States from the highest courts of the states? Would that be a feasible arrangement? Would you entrust those (possible hostile) courts to establish a proper evidentiary record for a federal appeal?

5. See if you can follow Justice Holmes' description of the applicable principles of the common law. See ¶ [3]. According to Justice Holmes, what was Well Works' cause of action? What were the elements of that cause of action? Were any of them federal? If not, did Well Works' case satisfy the Well-Pleaded Complaint Rule? If it didn't, why didn't the Court simply rely on *Mottley* and throw the case out of federal court on that ground? Why the extra work? Please also note the fascinating bit of information that Justice Holmes provides, that trying to persuade someone not to do business with someone else was actionable, subject to the affirmative defense that the defendant and the plaintiff were competitors. This suggests that, at common law, a non-competitor could be liable for persuading people not to do business with someone. The First Amendment would almost certainly preclude such an action today. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (recognizing constitutional protection for a boycott).

6. There's a certain irony in a case like *Well Works*. Under 28 U.S.C. § 1338(a), federal courts "have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks." In fact, § 1338(a) goes on to provide, "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." Thus, if, instead of waiting for Well Works to sue for trade libel, Layne & Bowler had sued Well Works for infringement, not only *could* that action have proceeded in federal court, but it would have *had to*. Thus, the same basic issue could be *exclusively* heard in either of two judicial systems, depending on who chose to sue first.

7. *Well Works* tells you something about Justice Holmes' philosophy of law. As far as Justice Holmes was concerned, a law that the sovereign neglected to enforce was no law at all. Thus, if the United States chose to make the validity and scope of Layne & Bowler's patent an issue, but chose not authorize Well Works (as opposed to Layne & Bowler) to bring suit over it, the United States' policy was "law" only to the extent that Layne & Bowler chose to make it so. See Ann Woolhandler & Michael G. Collins, Federal Question Jurisdiction and Justice Holmes, 84 Notre Dame L. Rev. 2151, 2179 (2009) (quoting Oliver Wendell Holmes, Jr., Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 12 (1870)) ("For Holmes, legal duty was prior to right, and a duty was only 'created by commands which may be broken at the expense of incurring a penalty.'").

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

MR. JUSTICE DAY delivered the opinion of the Court.

[1] A bill [*i.e.*, the equitable version of a complaint] was filed in the United States District Court for . . . the Western District of Missouri by a shareholder in the Kansas City Title & Trust Company to enjoin the company, its officers, agents and employees, from investing the funds of the company in farm loan bonds issued by Federal Land Banks or Joint-Stock Land Banks under authority of the Federal Farm Loan Act of July 17, 1916, as amended by [the] Act [of] Jan. 18, 1918.

[2] The relief was sought on the ground that these acts were beyond the constitutional power of Congress. The bill avers that the board of directors of the company are about to invest its funds in the bonds to the amount of $10,000 in each of the classes described, and will do so unless enjoined by the court in this action. . . . .

* * *

[3] The bill prays that the acts of Congress authorizing the creation of the banks[,] shall be adjudged and decreed to be unconstitutional, void and of no effect, and that the issuance of the farm loan bonds, and the taxation exemption feature thereof, shall be adjudged and decreed to be invalid.

[4] The First Joint-Stock Land Bank of Chicago and the Federal Land Bank of Wichita, Kan., were allowed to intervene and became parties defendant to the suit. The Kansas City Title & Trust Company filed a motion to dismiss in the nature of a general demurrer, and upon hearing the District Court entered a decree dismissing the bill. From this decree appeal was taken to this court.

[5] No objection is made to the federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined. The company is authorized to invest

its funds in legal securities only. The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the acts of Congress undertaking to organize the banks and authorize the issue of the bonds. No other reason is set forth in the bill as a ground of objection to the proposed investment by the board of directors acting in the company's behalf. As diversity of citizenship is lacking, the jurisdiction of the District Court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States. Judicial Code, § 24 [now 28 U.S.C. § 1331].

[6] The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

[7] At an early date, considering the grant of constitutional power to confer jurisdiction upon the federal courts, Chief Justice Marshall said: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821); and again, when "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824).

[8] These definitions were quoted and approved in *Patton v. Brady*, 184 U.S. 608, 611 (1902), citing *Gold Washing Co. v. Keyes*, 96 U.S. 199, 201 (1877); *Tennessee v. Davis*, 100 U.S. 257 (1880); *White v. Greenhow*, 114 U.S. 307 (1885); *Railroad Co. v. Mississippi*, 102 U.S. 135, 139 (1880).

* * *

[9] The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is therefore apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

[10] The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by mis-application of the funds of the corporation, gives jurisdiction under the principles settled in [our precedents]. We are therefore of the opinion that the District Court had jurisdiction under the averments of the bill and that a direct appeal to this court upon constitutional grounds is authorized.

[The Court went on to uphold the legislation that created the banks and authorized them to sell the bonds at issue.]

[11] It follows that the decree of the District Court is

Affirmed.

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

MR. JUSTICE HOLMES, dissenting.

[12] No doubt it is desirable that the question raised in this case should be set at rest, but that can be done by the Courts of the United States only within the limits of the jurisdiction conferred upon them by the Constitution and the laws of the United States. As this suit was brought by a citizen of Missouri against a Missouri corporation the single ground upon which the jurisdiction of the District Court can be maintained is that the suit "arises under the Constitution or laws of the United States" within the meaning of section 24 of the Judicial Code [now 28 U.S.C. § 1331]. I am of opinion that this case does not arise in that way and therefore that the bill should have been dismissed.

[13] It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State.

[14] But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole, as held in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819-823 (1824), which perhaps is all that is meant by the less guarded expressions in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821). I am content to assume this to be so, although the *Osborn Case* has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not

cause a case under the State law to be also a case under the law of the United States, and so it has been decided by this Court again and again.

[15] I [remind my colleagues of] a decision, reached not without discussion and with but a single dissent, that "a suit arises under the law that creates the cause of action." That was the *ratio decidendi* of *American Wells Works Co. v. Layne & Bowler Co.*, 241 U. S. 257, 260 (1916). I know of no decisions to the contrary and see no reason for overruling it now.

MR. JUSTICE MCREYNOLDS concurs in this dissent. In view of our opinion that this Court has no jurisdiction we express no judgment on the merits.

Notes on Smith

1. What happened to *Well Works*? In 1916, the Court held that a case "arises under" the law of the United States — at least for statutory purposes — if and only if the United States is the source of the plaintiff's cause of action. As we see here, only five years later the Court allowed a case to proceed in federal court where the plaintiff's cause of action — a bill in equity to restrain a corporation from purchasing certain bonds — was a creation of the State of Missouri. Indeed, the rule of *Smith*, which you can find in ¶ [6], is conceptually identical to the Well-Pleaded Complaint Rule, which itself only requires that a federal issue appear on the face of the plaintiff's well-pleaded complaint, not that the complaint itself have a federal origin. Although the majority in *Smith* may have missed the discrepancy between its analysis and that of *Well Works*, Justice Holmes obviously did not. See ¶¶ [14]-[15].

2. *The status of Justice Holmes' test.* In the notes after *Well Works*, the editor asked if you perceived Justice Holmes' analysis in that case as being *statutory* or *constitutional* in nature. Please take a close look at ¶ [14] of *Smith*, and ask yourself the same question.

3. *Pragmatics again?* You may recall that the conventional wisdom on *Shoshone Mining* is that the case *satisfied Well Works* yet failed § 1331 for pragmatic reasons. Can something similar be said about *Smith*? What was really at issue in *Smith*? What would have happened if a court had held invalid any bonds issued by Federal Land Banks or Joint-Stock Land Banks under authority of the Federal Farm Loan Act of 1916, as amended? Might the United States have had a strong interest in a federal forum for this case? (You may have noted that the First Joint-Stock Land Bank of Chicago and the Federal Land Bank of Wichita, Kansas, had asked to intervene as defendants in the suit. See ¶ [4].) Also, was there any issue in this case *other than* the constitutionality of these bonds?

Merrell Dow Pharmaceuticals, Inc. v. Thompson
478 U.S. 804 (1986)

JUSTICE STEVENS delivered the opinion of the Court.

[1] The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," [as per] 28 U.S.C. § 1331.

I

[2] The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, a corporation, that manufactures and distributes the drug Bendectin. The complaints were filed in the Court of Common Pleas in Hamilton County, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), as amended, because its labeling did not provide adequate warning that its use was potentially dangerous. Paragraph 26 alleged that the violation of the FDCA "in the promotion" of Bendectin [gives rise to] "a rebuttable presumption of negligence." Paragraph 27 alleged that the "violation of said federal statutes directly and proximately caused the injuries suffered" by the two infants.

[3] Petitioner filed a timely petition for removal from the state court to the Federal District Court alleging that the action was "founded, in part, on an alleged claim arising under the laws of the United States." After removal, the two cases were consolidated. Respondents filed a motion to remand to the state forum on the ground that the federal court lacked subject-matter jurisdiction. Relying on our decision in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the District Court held that Count IV of the complaint alleged a cause of action arising under federal law and denied the motion to remand. It then granted petitioner's motion to dismiss on *forum non conveniens* grounds.

[4] The Court of Appeals for the Sixth Circuit reversed. . . .

[5] We granted certiorari and we now affirm.

II

[6] Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes. That grant of power, however, is not self-executing, and it was not until

the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction. Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824), we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power.

[7] Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well-pleaded complaint." A defense that raises a federal question is inadequate to confer federal jurisdiction. *Louisville & Nashville R. Co. v. Mottley*, 211 U. S. 149 (1908). Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U.S.C. § 1441(b), moreover, the question for removal jurisdiction must also be determined by reference to the "well-pleaded complaint."

[8] [T]he propriety of the removal in this case thus turns on whether the case falls within the original "federal question" jurisdiction of the federal courts. There is no "single, precise definition" of that concept; rather, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system."

[9] This much, however, is clear. The "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a "suit arises under the law that creates the cause of action." [*American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).] Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

[10] We have, however, also noted that a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 9 (1983). Our actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the Employee Retirement Income Security Act of 1974, but we nevertheless concluded that federal jurisdiction was lacking.

* * *

[11] In undertaking this inquiry into whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action, it is, of course, appropriate to begin by referring to our understanding of the statute conferring federal-question jurisdiction. We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words. . . . .

The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). . . . .

[12] In this case, both parties agree with the Court of Appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA. Thus, as the case comes to us, it is appropriate to assume that, under the settled framework for evaluating whether a federal cause of action lies, some combination of the following factors is present: (1) the plaintiffs are not part of the class for whose special benefit the statute was passed; (2) the indicia of legislative intent reveal no congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purposes of the legislative scheme; and (4) the respondents' cause of action is a subject traditionally relegated to state law. In short, Congress did not intend a private federal remedy for violations of the statute that it enacted.

* * *

[13] The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to [establish] a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.

III

[14] Petitioner advances three arguments to support its position that, even in the face of this congressional preclusion of a federal cause of action for a violation of the federal statute, federal-question jurisdiction may lie for the violation of the federal statute as an element of a state cause of action.

[15] First, petitioner contends that the case represents a straightforward application of the statement in *Franchise Tax Board* that federal-question jurisdiction is appropriate when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." [But, far] from creating some kind of automatic test, *Franchise Tax Board* . . . candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would

serve congressional purposes and the federal system. This conclusion is fully consistent with the very sentence relied on so heavily by petitioner. We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

[16] Second, petitioner contends that there is a powerful federal interest in seeing that the federal statute is given uniform interpretations, and that federal review is the best way of insuring such uniformity. In addition to the significance of the congressional decision to preclude a federal remedy, we do not agree with petitioner's characterization of the federal interest and its implications for federal-question jurisdiction. To the extent that petitioner is arguing that state use and interpretation of the FDCA pose a threat to the order and stability of the FDCA regime, petitioner should be arguing, not that federal courts should be able to review and enforce state FDCA-based causes of action as an aspect of federal-question jurisdiction, but that the FDCA pre-empts state-court jurisdiction over the issue in dispute. Petitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action.

[17] Finally, petitioner argues that, whatever the general rule, there are special circumstances that justify federal-question jurisdiction in this case. Petitioner emphasizes that it is unclear whether the FDCA applies to sales in Canada and Scotland; there is, therefore, a special reason for having a federal court answer the novel federal question relating to the extra-territorial meaning of the Act. We reject this argument. We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue. Although it is true that federal jurisdiction cannot be based on a frivolous or insubstantial federal question, "the interrelation of federal and state authority and the proper management of the federal judicial system," would be ill served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort. The novelty of an FDCA issue is not sufficient to give it status as a federal cause of action; nor should it be sufficient to give a state-based FDCA claim status as a jurisdiction-triggering federal question.

IV

[18] We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[19] The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

[20] Article III, § 2, of the Constitution provides that the federal judicial power shall extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." We have long recognized the great breadth of this grant of jurisdiction, holding that there is federal jurisdiction whenever a federal question is an "ingredient" of the action, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824), and suggesting that there may even be jurisdiction simply because a case involves "potential federal questions," *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting).

[21] Title 28 U.S.C. § 1331 provides, in language that parrots the language of Article III, that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." Although this language suggests that Congress intended in § 1331 to confer upon federal courts the full breadth of permissible "federal question" jurisdiction (an inference that is supported by the contemporary evidence), § 1331 has been construed more narrowly than its constitutional counterpart. Nonetheless, given the language of the statute and its close relation to the constitutional grant of federal-question jurisdiction, limitations on federal-question jurisdiction under § 1331 must be justified by careful consideration of the reasons underlying the grant of jurisdiction and the need for federal review. I believe that the limitation on federal jurisdiction recognized by the Court today is inconsistent with the purposes of § 1331. Therefore, I respectfully dissent.

I

[22] While the majority of cases covered by § 1331 may well be described by Justice Holmes' adage that "[a] suit arises under the law that creates the cause of action," it is firmly settled that there may be federal-question jurisdiction even though both the right asserted and the remedy sought by the plaintiff are state created. The rule as to such cases was stated . . . in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In *Smith*, a shareholder of the defendant corporation brought suit in the federal court to enjoin the defendant from investing corporate funds in bonds issued under the authority of the Federal Farm Loan Act. The plaintiff alleged that Missouri law imposed a fiduciary duty on the corporation to invest only in bonds that were authorized by a valid law and argued that, because the Farm Loan Act was unconstitutional, the defendant could not purchase bonds issued under its authority. Although the cause of action was wholly state created, the Court held that there was original federal jurisdiction over the case:

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under [the statute granting federal question jurisdiction].

[23] The continuing vitality of *Smith* is beyond challenge. We have cited it approvingly on numerous occasions, and reaffirmed its holding several times — most recently just three Terms ago by a unanimous Court in *Franchise Tax Board*. Moreover[,] *Smith* has been widely cited and followed in the lower federal courts. Furthermore, the principle of the *Smith* case has been recognized and endorsed by most commentators as well.

[24] There is, to my mind, no question that there is federal jurisdiction over the respondents' fourth cause of action under the rule set forth in *Smith* and reaffirmed in *Franchise Tax Board*. Respondents pleaded that petitioner's labeling of the drug Bendectin constituted "misbranding" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), and that this violation "directly and proximately caused" their injuries. Respondents asserted in the complaint that this violation established petitioner's negligence *per se* and entitled them to recover damages without more. No other basis for finding petitioner negligent was asserted in connection with this claim. As pleaded, then, respondents' "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States." *Smith*, 255 U.S. at 199. Furthermore, although petitioner disputes its liability under the FDCA, it concedes that respondents' claim that petitioner violated the FDCA is "colorable, and rests upon a reasonable foundation." . . . .

II

[25] The Court apparently does not disagree with any of this — except, of course, for the conclusion. According to the Court, if we assume that Congress did not intend that there be a private federal cause of action under a particular federal law[,] we must also assume that Congress did not intend that there be federal jurisdiction over a state cause of action that is determined by that federal law. Therefore, assuming — only because the parties have made a similar assumption — that there is no private cause of action under the FDCA, the Court holds that there is no federal jurisdiction over the plaintiffs' claim[.]

[26] The Court nowhere explains the basis for this conclusion. Yet it is hardly self-evident. Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law? Clearly, the decision not to provide a private federal remedy should not affect federal jurisdiction unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction. Thus, it is necessary to examine the reasons for Congress' decisions to grant or withhold both federal jurisdiction and private remedies, something the Court has not done.

A

* * *

[27] . . . . Congress passes laws in order to shape behavior; a federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law. Because all laws are imprecise to some degree, disputes inevitably arise over what specifically Congress intended to require or permit. It is the duty of courts to interpret these laws and apply them in such a way that the congressional purpose is realized. As noted above, Congress granted the district courts power to hear cases "arising under" federal law in order to enhance the likelihood that federal laws would be interpreted more correctly and applied more uniformly. In other words, Congress determined that the availability of a federal forum to adjudicate cases involving federal questions would make it more likely that federal laws would shape behavior in the way that Congress intended.

[28] By making federal law an essential element of a state-law claim, the State places the federal law into a context where it will operate to shape behavior: the threat of liability will force individuals to conform their conduct to interpretations of the federal law made by courts adjudicating the state-law claim. It will not matter to an individual found liable whether the officer who arrives at his door to execute judgment is wearing a state or a federal uniform; all he cares about is the fact that a sanction is being imposed — and may be imposed again in the future — because he failed to comply with the federal law. Consequently, the possibility that the federal law will be incorrectly interpreted in the context of adjudicating the state-law claim implicates the concerns that led Congress to grant the district courts power to adjudicate cases involving federal questions in precisely the same way as if it was federal law that "created" the cause of action. It therefore follows that there is federal jurisdiction under § 1331.

B

[29] The only remaining question is whether the assumption that Congress decided not to create a private cause of action alters this analysis in a way that makes it inappropriate to exercise original federal jurisdiction. . . . .

* * *

[30] . . . . I certainly subscribe to the proposition that the Court should consider legislative intent in determining whether or not there is jurisdiction under § 1331. But the Court has not examined the purposes underlying either the FDCA or § 1331 in reaching its conclusion that Congress' presumed decision not to provide a private federal remedy under the FDCA must be taken to withdraw federal jurisdiction over a private state remedy that imposes liability for violating the FDCA. Moreover, such an examination demonstrates not only that it is consistent

with legislative intent to find that there is federal jurisdiction over such a claim, but, indeed, that it is the Court's contrary conclusion that is inconsistent with congressional intent.

[31] The enforcement scheme established by the FDCA is typical of other, similarly broad regulatory schemes. Primary responsibility for overseeing implementation of the Act has been conferred upon a specialized administrative agency, here the Food and Drug Administration (FDA). Congress has provided the FDA with a wide-ranging arsenal of weapons to combat violations of the FDCA, including authority to obtain an *ex parte* court order for the seizure of goods subject to the Act, authority to initiate proceedings in a federal district court to enjoin continuing violations of the FDCA, and authority to request a United States Attorney to bring criminal proceedings against violators. Significantly, the FDA has no independent enforcement authority; final enforcement must come from the federal courts, which have exclusive jurisdiction over actions under the FDCA. Thus, while the initial interpretive function has been delegated to an expert administrative body whose interpretations are entitled to considerable deference, final responsibility for interpreting the statute in order to carry out the legislative mandate belongs to the federal courts.

[32] Given that Congress structured the FDCA so that all express remedies are provided by the federal courts, it seems rather strange to conclude that it either "flout[s]" or "undermine[s]" congressional intent for the federal courts to adjudicate a private state-law remedy that is based upon violating the FDCA. That is, assuming that a state cause of action based on the FDCA is not preempted, it is entirely consistent with the FDCA to find that it "arises under" federal law within the meaning of § 1331. Indeed, it is the Court's conclusion that such a state cause of action must be kept *out* of the federal courts that appears contrary to legislative intent inasmuch as the enforcement provisions of the FDCA quite clearly express a preference for having federal courts interpret the FDCA and provide remedies for its violation.

[33] It may be that a decision by Congress not to create a private remedy is intended to preclude all private enforcement. If that is so, then a state cause of action that makes relief available to private individuals for violations of the FDCA is pre-empted. But if Congress' decision not to provide a private federal remedy does *not* pre-empt such a state remedy, then, in light of the FDCA's clear policy of relying on the federal courts for enforcement, it also should not foreclose federal jurisdiction over that state remedy. Both § 1331 and the enforcement provisions of the FDCA reflect Congress' strong desire to utilize the federal courts to interpret and enforce the FDCA, and it is therefore at odds with both these statutes to recognize a private state-law remedy for violating the FDCA but to hold that this remedy cannot be adjudicated in the federal courts.

[34] The Court's contrary conclusion requires inferring from Congress' decision not to create a private federal remedy that, while some private enforcement is permissible in state courts, it is "bad" if that enforcement comes from the *federal* courts. But that is simply illogical. Congress' decision to withhold a private right of action and to rely instead on public enforcement reflects congressional concern with obtaining more accurate implementation and more

coordinated enforcement of a regulatory scheme. These reasons are closely related to the Congress' reasons for giving federal courts original federal-question jurisdiction. Thus, if anything, Congress' decision not to create a private remedy *strengthens* the argument in favor of finding federal jurisdiction over a state remedy that is not pre-empted.

Notes on Merrell Dow

1. How would you have resolved this case? Why? What purposes are served by forbidding federal courts to hear a case like this one?

2. As you can see, the district court originally dismissed this case on the ground of "forum non conveniens." See ¶ [3]. *Wikipedia* defines *forum non conveniens* as a "doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties." Do you see why the court took that position?

3. As you can see, Justice Stevens puts enormous emphasis on the fact that Congress did not create a "private cause of action" under the Food, Drug and Cosmetic Act. See ¶¶ [12]-[13]. Do you understand what this means, and the role that this plays in Justice Stevens' analysis? A statute will typically set forth various "rules of primary behavior." An example would be a rule that "everyone in a motorized vehicle must stop at a red light." A private cause (or right) of action would authorize someone hurt by someone else's failure to stop at a red light to sue that other person for some kind of relief. Most private rights of action are explicit, but occasionally courts will "infer" a private right of action from the text or context of the statute. This is becoming rare, as you will learn later in this course. In any case, the non-existence of an "implied private right of action" generally reflects the fact that Congress did not *intend* to create such an action. See ¶ [12]. If this is the case, Justice Stevens proceeds to ask in *Merrell Dow*, why then would Congress want a case arising under *state law* presenting the same issues to be heard in federal court? See ¶ [13]. Are there any flaws in Justice Stevens' analysis?

4. An older case much like *Merrell Dow* is *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934). In this case, Moore brought suit against the C&O in federal court, arguing (among other things) that the C&O had violated the Kentucky Employers' Liability Act, which governed injuries in intrastate commerce. Although this count arose under the law of Kentucky — and thus would have failed *American Well Works* — the state had by law provided that violation of a federal standard regarding equipment constituted negligence *per se* for purposes of liability. Thus, Moore's allegation that a defective lever violated the Federal Safety Appliance Act was arguably a part of his case-in-chief. Nevertheless, the Court denied federal jurisdiction. As your editor has written:

> Although the Court provided relatively little analysis in support of this conclusion, subsequent treatment of the case has settled on the explanation that the mere embedding of a federal standard in an ordinary action for negligence under the law

> of a state does not suffice to make a case "arise under" the laws of the United States, even if it literally satisfies the well-pleaded complaint rule.

Another Look at *Skelly Oil* and *Franchise Tax Board*, 80 Alb. L. Rev. 53, 70 (2016-2017). In point of fact, Moore's case might actually have *failed* the Well-Pleaded Complaint Rule, in the sense that "negligence *per se*" could in fact operate as a *reply* to an *affirmative defense* of assumption of the risk or contributory negligence, rather than as a component of a plaintiff's case-in-chief. If this is so, it would not come into play until the third round of pleading, perhaps in an amended complaint, or perhaps on dispositive motions. See *id.* at 69 n.107. Justice Brennan made this point in his dissent in *Moore*.

5. Some courts and commentators thought *Merrell Dow* had resurrected *Well Works*, but the Court put such speculation to rest in 2005 with *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308. This case arose after the IRS seized certain real property belonging to Grable to satisfy the latter's tax delinquency. The IRS later sold this property to Darue. Grable brought an action against Darue to quiet title, arguing that the IRS had failed to comply with applicable federal law in giving Grable notice of the seizure. (Grable had actual notice, but the IRS had arguably failed to comply with the terms of the statute.) Grable's cause of action was itself a creature of the State of Michigan. Thus, the case would not have satisfied *Well Works*. On the other hand, the adequacy of the IRS's notice was part of Grable's well-pleaded complaint. Thus, the case satisfied *Smith*. The question, however, was whether the federal issue properly embedded in Grable's complaint was sufficiently important to merit a federal forum. Speaking through Justice Souter, the Court held that it was:

> This case warrants federal jurisdiction. Grable's state complaint must specify "the facts establishing the superiority of [its] claim," Mich. Ct. Rule 3.411(B)(2)(c), and Grable has premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal law. Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case. The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the "prompt and certain collection of delinquent taxes," and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters. Finally, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.

Grable & Sons, 545 U.S. at 314-15.

On the way to this conclusion, Justice Souter explained *Merrell Dow* as follows:

> *Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" that § 1331 requires. The absence of any federal cause of action affected *Merrell Dow*'s result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. *The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.* For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.

Id. at 318 (emphasis added). The italicized language is complex. Justice Souter is saying here that the absence of a federal cause of action in *Merrell Dow* did not *categorically* preclude federal jurisdiction. Instead, it merely indicated that Congress was against allowing a "horde" of state claims to be heard in federal court. Hence his reference to a "missing welcome mat."

Is this all too subtle? Justice Souter refers here to a "missing welcome mat." You may recall Professor Cohen's reference to a "broken compass" earlier in the Reader. See William Cohen, "The Broken Compass: The Requirement That a Case Arise 'Directly' under Federal Law," 115 U. Pa. L. Rev. 890 (1967). Similarly, Justice Cardozo described these situations as "kaleidoscopic" in *Gully v. First National Bank*, 299 U.S. 109, 117 (1936), a famous case in this area. A commentator has seized upon these metaphors to argue for a resurrection of *Well Works*. See Rory M. Ryan, "It's Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass," 75 Tenn. L. Rev. 659 (2008). Is he right? Justice Thomas made the same point in his separate opinion in *Grable & Sons*:

> The Court faithfully applies our precedents interpreting 28 U.S.C. § 1331 to authorize federal-court jurisdiction over some cases in which state law creates the cause of action but requires determination of an issue of federal law. In this case, no one has asked us to overrule those precedents and adopt the rule Justice Holmes set forth in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), limiting § 1331 jurisdiction to cases in which federal law creates the cause of action pleaded on the face of the plaintiff's complaint. In an appropriate

> case, and perhaps with the benefit of better evidence as to the original meaning of § 1331's text, I would be willing to consider that course.
>
> Jurisdictional rules should be clear. Whatever the virtues of the *Smith* standard, it is anything but clear. [On the other hand, whatever] the vices of the *American Well Works* rule, it is clear. Moreover, it accounts for the "vast majority" of cases that come within § 1331 under our current case law — further indication that trying to sort out which cases fall within the smaller *Smith* category may not be worth the effort it entails. Accordingly, I would be willing in appropriate circumstances to reconsider our interpretation of § 1331.

Do you agree?

[14-15] **Skelly Oil Co. v. Phillips Petroleum Co.**
339 U.S. 667 (1950)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

[1] In 1945, Michigan-Wisconsin Pipe Line Company sought from the Federal Power Commission a certificate of public convenience and necessity, required by § 7(c) of the Natural Gas Act, for the construction and operation of a pipe line to carry natural gas from Texas to Michigan and Wisconsin. A prerequisite for such a certificate is adequate reserves of gas. To obtain these reserves Michigan-Wisconsin entered into an agreement with Phillips Petroleum Company on December 11, 1945, whereby the latter undertook to make available gas from the Hugoton Gas Field, sprawling over Kansas, Oklahoma and Texas, which it produced or purchased from others. Phillips had contracted with petitioners, Skelly Oil Company, Stanolind Oil and Gas Company, and Magnolia Petroleum Company, to purchase gas produced by them in the Hugoton Field for resale to Michigan-Wisconsin. Each contract provided that "in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before [December 1, 1946] a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller [a petitioner] shall have the right to terminate this contract by written notice to Buyer [Phillips] delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate." The legal significance of this provision is at the core of this litigation.

[2] The Federal Power Commission, in response to the application of Michigan-Wisconsin, on November 30, 1946, ordered that "A certificate of public convenience and necessity be and it is hereby issued to applicant [Michigan-Wisconsin], upon the terms and conditions of this order," listing among the conditions that there be no transportation or sale of natural gas by means of the sanctioned facilities until all necessary authorizations were obtained from the State of Wisconsin and the communities proposed to be served, that Michigan-Wisconsin should have the approval of the Securities and Exchange Commission for its plan of financing, that the applicant should file for the approval of the Commission a schedule of reasonable rates, and that the sanctioned facilities should not be used for the transportation of gas to Detroit and Ann Arbor except with due regard for the rights and duties of Panhandle Eastern Pipe Line Company, which had intervened before the Federal Power Commission, in its established service for resale in these areas, such rights and duties to be set forth in a supplemental order. It was also provided that Michigan-Wisconsin should have fifteen days from the issue of the supplemental order to notify the Commission whether the certificate "as herein issued is acceptable to it." Finally, the Commission's order provided that for purposes of computing the time within which applications for rehearing could be filed, "the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

[3] News of the Commission's action was released on November 30, 1946, but the actual content of the order was not made public until December 2, 1946. Petitioners severally, on

December 2, 1946, gave notice to Phillips of termination of their contracts on the ground that Michigan-Wisconsin had not received a certificate of public convenience and necessity. Thereupon Michigan-Wisconsin and Phillips brought suit against petitioners in the District Court for the Northern District of Oklahoma. Alleging that a certificate of public convenience and necessity, "within the meaning of said Natural Gas Act and said contracts" had been issued prior to petitioners' attempt at termination of the contracts, they invoked the Federal Declaratory Judgment Act for a declaration that the contracts were still "in effect and binding upon the parties thereto." Motions by petitioners to have Michigan-Wisconsin dropped as a party plaintiff were sustained, but motions to dismiss the complaint for want of jurisdiction were denied. The case then went to the merits, and the District Court decreed that the contracts between Phillips and petitioners had not been "effectively terminated and that each of such contracts remain[s] in full force and effect." The Court of Appeals for the Tenth Circuit affirmed, and we brought the case here, because it raises in sharp form the question whether a suit like this "arises under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331, so as to enable District Courts to give declaratory relief under the Declaratory Judgment Act[,] now 28 U.S.C. § 2201.

[4] "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. Prior to that Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction — the limited subject matters which alone Congress had authorized the District Courts to adjudicate — were not impliedly repealed or modified.

[5] If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would "arise" under the State law governing the contracts. Whatever federal claim Phillips may be able to urge would in any event be injected into the case only in anticipation of a defense to be asserted by petitioners. "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully v. First National Bank*, 299 U.S. 109, 115 (1936); compare 28 U.S.C. § 1257, with 28 U.S.C. § 1331. Ever since *Metcalf v. Watertown*, 128 U.S. 586, 589 (1888), it has been settled doctrine that where a suit is brought in the federal courts "upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character." But "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws

of the United States, does not make the suit one arising under that Constitution or those laws." *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464 (1894). The plaintiff's claim itself must present a federal question "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

[6] These decisions reflect the current of jurisdictional legislation since the Act of March 3, 1875, first entrusted to the lower federal courts wide jurisdiction in cases "arising under this Constitution, the Laws of the United States, and Treaties." U.S. Const. Art. III, § 2. "The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts [which became the District Courts] of the United States." With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations.

[7] To be observant of these restrictions is not to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law. Not only would this unduly swell the volume of litigation in the District Courts but it would also embarrass those courts — and this Court on potential review — in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts. To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act. Since the matter in controversy as to which Phillips asked for a declaratory judgment is not one that "arises under the . . . laws . . . of the United States" and since as to Skelly and Stanolind jurisdiction cannot be sustained on the score of diversity of citizenship, the proceedings against them should have been dismissed.

[8] As to Magnolia, a Texas corporation, a different situation is presented. Since Phillips was a Delaware corporation, there is diversity of citizenship. Magnolia had qualified to do business in Oklahoma and appointed an agent for service of process in accordance with the prevailing Oklahoma statute. Magnolia claimed that the subject matter of this proceeding did not arise in Oklahoma within the meaning of its consent to be sued. This contention was rejected below, and we do not reexamine the local law as applied by the lower courts. [V]enue was properly laid in Oklahoma; that the declaratory remedy which may be given by the federal courts may not be available in the State courts is immaterial.

[9] Therefore, in the case of Magnolia we must reach the merits. . . . .

* * *

MR. JUSTICE BLACK agrees with the Court of Appeals and would affirm its judgment.

MR. JUSTICE DOUGLAS took no part in the consideration or disposition of this case.

[The opinion of Chief Justice Vinson, with whom Justice Burton joined, dissenting in part, is omitted.]

Notes on Skelly Oil

1. Your editor has written an article about *Skelly Oil* and *Franchise Tax Board* (the next main case). See Another Look at *Skelly Oil* and *Franchise Tax Board*, 80 Alb. L. Rev. 53 (2016-2017). This article should not be read while operating heavy machinery.

2. A declaratory judgment is a minimalist form of relief, in the sense that it does not contemplate any immediate action or change in behavior on the defendant's part if the plaintiff prevails. That is, it does not contemplate the transfer of money, the return of a cow, withdrawal from property, or any similar coerced act. It simply contemplates a clarification of the plaintiff's rights and duties with respect to the defendant. You can perhaps see both the advantages and disadvantages of having such a device available. On the one hand, it can provide useful information to parties before they commit themselves to strategies that they might have to unwind. On the other hand, the devices also allows parties to ask questions too broadly, or too early, or unnecessarily — just as a doctor might order tests that are unnecessary.

3. Justice Frankfurter, like his fellow Progressive Justice Louis D. Brandeis before him, was a bitter opponent of declaratory judgments. In his view, this device simply enabled regulated entities, such as railroads, to make frontal assaults on Progressive legislation long before such legislation would have a specific effect on regulated entities. One should not be surprised, therefore, that Justice Frankfurter construed the Federal Declaratory Judgment Act as narrowly as he did in *Skelly Oil*, to preserve the scope of the Well-Pleaded Complaint Rule.

Franchise Tax Board of California v. Construction Laborers Vacation Trust
463 U.S. 1 (1983)

JUSTICE BRENNAN delivered the opinion of the Court.

[1] The principal question in dispute between the parties is whether the Employee Retirement Income Security Act of 1974 (ERISA), as amended, permits state tax authorities to collect unpaid state income taxes by levying on funds held in trust for the taxpayers under an ERISA-covered vacation benefit plan. The issue is an important one, which affects thousands of federally regulated trusts and all nonfederal tax collection systems, and it must eventually receive a definitive, uniform resolution. Nevertheless, for reasons involving perhaps more history than

logic, we hold that the lower federal courts had no jurisdiction to decide the question in the case before us, and we vacate the judgment and remand the case with instructions to remand it to the state court from which it was removed.

I

[2] None of the relevant facts is in dispute. Appellee Construction Laborers Vacation Trust for southern California (CLVT) is a trust established by an agreement between four associations of employers active in the construction industry in southern California and [various unions and affiliated entities]. The purpose of the agreement and trust was to establish a mechanism for administering the provisions of a collective-bargaining agreement that grants construction workers a yearly paid vacation.[2] The trust agreement expressly proscribes any assignment, pledge, or encumbrance of funds held in trust by CLVT. The Plan that CLVT administers is unquestionably an "employee welfare benefit plan" within the meaning of [ERISA], and CLVT and its individual trustees are thereby subject to extensive regulation under [that statute].

[3] Appellant Franchise Tax Board is a California agency charged with enforcement of that State's personal income tax law. California law authorizes appellant to require any person in possession of "credits or other personal property or other things of value, belonging to a taxpayer" "to withhold . . . the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board." Any person who, upon notice by the Franchise Tax Board, fails to comply with its request to withhold and to transmit funds becomes personally liable for the amounts identified in the notice.

[4] In June 1980, the Franchise Tax Board filed a complaint in state court against CLVT and its trustees. Under the heading "First Cause of Action," appellant alleged that CLVT had failed to comply with three levies issued under [the applicable statute],[4] concluding with the

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[2]As part of the hourly compensation due bargaining unit members, employers pay a certain amount to CLVT, which places the money in an account for each employee. Once a year, CLVT distributes the money in each account to the employee for whom it is kept, provided the employee complies with CLVT's application procedures. . . . . This system was set up in large part because union members typically work for several employers during the course of a year.

[4]At several points in 1977 and 1978, appellant issued notices to CLVT requesting it to withhold and to transmit approximately $380 in unpaid taxes, interest, and penalties due from three individuals. CLVT did not dispute that the individuals in question were beneficiaries of its trust or that it was then holding vacation benefit funds for them. In each case, however, it acknowledged receipt of appellant's notice and informed appellant that it had requested an opinion letter from the Administrator for Pension and Welfare Benefit Programs of the United States Department of Labor as to whether it was permitted under ERISA to honor appellant's levy. CLVT also informed appellant that it would withhold the funds from the individual

allegation that it had been "damaged in a sum . . . not to exceed $380.56 plus interest from June 1, 1980." Under the heading "Second Cause of Action," appellant incorporated its previous allegations and added:

> There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The Board [appellant] contends that defendants [CLVT] are obligated and required by law to pay over to the Board all amounts held . . . in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.
>
> [D]efendants will continue to refuse to honor the Board's levies in this regard. Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy.

[5] In a prayer for relief, appellant requested damages for defendants' failure to honor the levies and a declaration that defendants are "legally obligated to honor all future levies by the Board."

[6] CLVT removed the case to the United States District Court for the Central District of California, and the court denied the Franchise Tax Board's motion for remand to the state court. On the merits, the District Court ruled that ERISA did not pre-empt the State's power to levy on funds held in trust by CLVT. CLVT appealed, and the court of Appeals reversed. On petition for rehearing, the Franchise Tax Board renewed its argument that the District Court lacked jurisdiction over the complaint in this case. The petition for rehearing was denied, and an appeal was taken to this Court. We postponed consideration of our jurisdiction pending argument on the merits. We now hold that this case was not within the removal jurisdiction conferred by 28 U.S.C. § 1441, and therefore we do not reach the merits of the preemption question.

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workers until it received an opinion from the Department of Labor, but that it would not transmit the funds to the Franchise Tax Board.

Appellant took no immediate action to enforce its levy, and in January 1980 CLVT finally received the opinion letter it had requested. The opinion letter concluded: "[I]t is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA section 514." Accordingly, on January 7, 1980, counsel for CLVT furnished appellant a copy of the opinion letter, informed appellant that CLVT lacked the power to honor appellant's levies, and stated their intention to recommend that CLVT should disburse the funds it had withheld to the employees in question.

II

* * *

[7] Since the first version of § 1331 was enacted, Act of Mar. 3, 1875, the statutory phrase "arising under the Constitution, laws, or treaties of the United States" has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts. Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.

[8] The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under state law necessarily turned on some construction of federal law, see, *e.g.*, *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921), and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle, see *Flournoy v. Wiener*, 321 U.S. 253, 270-272 (1944) (Frankfurter, J., dissenting). . . . .

[9] One powerful doctrine has emerged, however — the "well-pleaded complaint" rule — which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts. Thus, a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim. . . . . For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law.[9] "[A] right or immunity created by the Constitution or laws of the United

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[9]The well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction.

It is possible to conceive of a rational jurisdictional system in which the answer as well as the complaint would be consulted before a determination was made whether the case "arose under" federal law, or in which original and removal jurisdiction were not coextensive. Indeed, until the 1887 amendments to the 1875 Act, as amended by Act of Aug. 13, 1888, the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily

States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 112 (1936).

[10] For many cases in which federal law becomes relevant only insofar as it sets bounds for the operation of state authority, the well-pleaded complaint rule makes sense as a quick rule of thumb. . . . .

[11] The rule, however, may produce awkward results, especially in cases in which neither the obligation created by state law nor the defendant's factual failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal pre-emption defense. Nevertheless, it has been correctly understood to apply in such situations. As we [have] said[:] ""By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully*, 299 U.S. at 116.

III

[12] Simply to state these principles is not to apply them to the case at hand. Appellant's complaint sets forth two "causes of action," one of which expressly refers to ERISA; if either comes within the original jurisdiction of the federal courts, removal was proper as to the whole case. See 28 U.S.C. § 1441(c). Although appellant's complaint does not specifically assert any particular statutory entitlement for the relief it seeks, the language of the complaint suggests (and the parties do not dispute) that appellant's "first cause of action" states a claim under Cal. Rev. & Tax. Code Ann. § 18818, and its "second cause of action" states a claim under California's Declaratory Judgment Act. As an initial proposition, then, the "law that creates the cause of action" is state law, and original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims . . . .

A

[13] Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties. For appellant's first cause of action — to enforce its levy, under § 18818 — a straightforward application of the well-pleaded complaint rule precludes original federal-court jurisdiction. California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid

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presented a substantial question of federal law. Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive. But those proposals have not been adopted.

claim for relief under state law. The well-pleaded complaint rule was framed to deal with precisely such a situation. As we discuss above, since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

[14] Appellant's declaratory judgment action poses a more difficult problem. Whereas the question of federal pre-emption is relevant to appellant's first cause of action only as a potential defense, it is a necessary element of the declaratory judgment claim. Under [the law of California], a party with an interest in property may bring an action for a declaration of another party's legal rights and duties with respect to that property upon showing that there is an "actual controversy relating to the legal rights and duties" of the parties. The only questions in dispute between the parties in this case concern the rights and duties of CLVT and its trustees under ERISA. Not only does appellant's request for a declaratory judgment under California law clearly encompass questions governed by ERISA, but appellant's complaint identifies no other questions as a subject of controversy between the parties. Such questions must be raised in a well-pleaded complaint for a declaratory judgment. Therefore, it is clear on the face of its well-pleaded complaint that appellant may not obtain the relief it seeks in its second cause of action without a construction of ERISA and/or an adjudication of its pre-emptive effect and constitutionality — all questions of federal law.

[15] Appellant argues that original federal-court jurisdiction over such a complaint is foreclosed by our decision in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). As we shall see, however, *Skelly Oil* is not directly controlling.

[16] In *Skelly Oil,* Skelly Oil and Phillips had a contract, for the sale of natural gas, that entitled the seller — Skelly Oil — to terminate the contract at any time after December 1, 1946, if the Federal Power Commission had not yet issued a certificate of convenience and necessity to a third party, a pipeline company to whom Phillips intended to resell the gas purchased from Skelly Oil. Their dispute began when the Federal Power Commission informed the pipeline company on November 30 that it would issue a conditional certificate, but did not make its order public until December 2. By this time Skelly Oil had notified Phillips of its decision to terminate their contract. Phillips brought an action in United States District Court under the federal Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaration that the contract was still in effect.

[17] There was no diversity between the parties, and we held that Phillips' claim was not within the federal-question jurisdiction conferred by § 1331. We reasoned:

> "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal

> courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. Prior to that Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction — the limited subject matters which alone Congress had authorized the District Courts to adjudicate — were not impliedly repealed or modified.

We then observed that, under the well-pleaded complaint rule, an action by Phillips to enforce its contract would not present a federal question. *Skelly Oil* has come to stand for the proposition that "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2767 (2d ed. 1983).

[18] 1. As an initial matter, we must decide whether the doctrine of *Skelly Oil* limits original federal-court jurisdiction under § 1331 — and by extension removal jurisdiction under § 1441 — when a question of federal law appears on the face of a well-pleaded complaint for a state-law declaratory judgment. Apparently, it is a question of first impression. As the passage quoted above makes clear, *Skelly Oil* relied significantly on the precise contours of the federal Declaratory Judgment Act as well as of § 1331. The Court's emphasis that the Declaratory Judgment Act was intended to affect only the remedies available in a federal district court, not the court's jurisdiction, was critical to the Court' reasoning. Our interpretation of the federal Declaratory Judgment Act in *Skelly Oil* does not apply of its own force to *state* declaratory judgment statutes, many of which antedate the federal statute.

[19] Yet while *Skelly Oil* itself is limited to the federal Declaratory Judgment Act, fidelity to its spirit leads us to extend it to state declaratory judgment actions as well. If federal district courts could take jurisdiction, either originally or by removal, of state declaratory judgment claims raising questions of federal law, without regard to the doctrine of *Skelly Oil,* the federal Declaratory Judgment Act — with the limitations *Skelly Oil* read into it — would become a dead letter. For any case in which a state declaratory judgment action was available, litigants could get into federal court for a declaratory judgment despite our interpretation of § 2201, simply by pleading an adequate state claim for a declaration of federal law. Having interpreted the Declaratory Judgment Act of 1934 to include certain limitations on the jurisdiction of federal district courts to entertain declaratory judgment suits, we should be extremely hesitant to interpret the Judiciary Act of 1875 and its 1887 amendments in a way that renders the limitations in the later statute nugatory. Therefore, we hold that under the jurisdictional statutes as they now stand federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal,

when a federal question is presented by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment.

[20] 2. The question, then, is whether a federal district court could take jurisdiction of appellant's declaratory judgment claim had it been brought under 28 U.S.C. § 2201.[18] The application of *Skelly Oil* to such a suit is somewhat unclear. Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.[19] Section 502(a)(3) of ERISA specifically grants trustees of ERISA-covered plans like CLVT a cause of action for injunctive relief when their rights and duties under ERISA are at issue, and that action is exclusively governed by federal law.[20] If CLVT could have sought an injunction under ERISA against application to it of state regulations that require acts

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[18]It may seem odd that, for purposes of determining whether removal was proper, we analyze a claim brought under state law, in state court, by a party who has continuously objected to district court jurisdiction over its case, as if that party had been trying to get original federal-court jurisdiction all along. That irony, however, is a more-or-less constant feature of the removal statute, under which a case is removable if a federal district court could have taken jurisdiction had the same complaint been filed.

[19]For instance, federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction. See *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. 2d 852 (7th Cir. 1937). Taking jurisdiction over this type of suit is consistent with the dictum in *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952), in which we stated only that a declaratory judgment plaintiff could not get original federal jurisdiction if the anticipated lawsuit by the declaratory judgment defendant would *not* "arise under" federal law. It is also consistent with the nature of the declaratory remedy itself, which was designed to permit adjudication of either party's claims of right. See E. Borchard, Declaratory Judgments (1934).

[20]Section 502(a)(3) provides:

> [A civil action may be brought] by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter . . . .

[In addition,] federal jurisdiction over suits under § 502 is exclusive, and they are governed entirely by federal common law[].

inconsistent with ERISA,[21] does a declaratory judgment suit by the State "arise under" federal law?

[21] We think not. We have always interpreted what *Skelly Oil* called "the current of jurisdictional legislation since the Act of March 3, 1875' with an eye to practicality and necessity. . . . . There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law. States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the pre-emption questions such enforcement may raise are tested there.[22] The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties, as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes.[23] It did not go so far as to provide that any suit *against* such parties must also be brought in federal court when they themselves did not choose to sue. The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in *Skelly Oil* [etc.] to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts. Accordingly, the same suit brought originally in state court is not removable either.

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[21]We express no opinion, however, whether a party in CLVT's position could sue under ERISA to enjoin or to declare invalid a state tax levy, despite the Tax Injunction Act, 28 U.S.C. § 1341. To do so, it would have to show either that state law provided no "speedy and efficient remedy" or that Congress intended § 502 of ERISA to be an exception to the Tax Injunction Act.

[22]Indeed, as appellant's strategy in this case shows, they may often be willing to go to great lengths to avoid federal-court resolution of a pre-emption question. Realistically, there is little prospect that States will flood the federal courts with declaratory judgment actions; most questions will arise, as in this case, because a State has sought a declaration in state court and the defendant has removed the case to federal court. Accordingly, it is perhaps appropriate to note that considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.

[23]Alleged patent infringers, for example, have a clear interest in swift resolution of the federal issue of patent validity — they are liable for damages if it turns out they are infringing a patent, and they frequently have a delicate network of contractual arrangements with third parties that is dependent on their right to sell or license a product. Parties subject to conflicting state and federal regulatory schemes also have a clear interest in sorting out the scope of each government's authority, especially where they face a threat of liability if the application of federal law is not quickly made clear.

[The Court went on to reject the Trust's second proffered basis for federal jurisdiction.]

It is so ordered.

Notes on Franchise Tax Board

Three doctrines we have been studying — the Well-Pleaded Complaint Rule, the Federal Declaratory Judgment Act and the Substantial Federal Question Test — interact in a complicated way. When applying the Well-Pleaded Complaint Rule to a request for declaratory relief, the federal courts had three fairly obvious approaches before them.

First, they could have ignored the fact that the plaintiff was seeking declaratory relief, and simply looked at the actual request for such relief (*i.e.*, the complaint) and asked whether it included a federal question. The problem with this approach is that it would have eviscerated the Well-Pleaded Complaint Rule, because, in order to make out a valid claim for declaratory relief, a plaintiff must anticipatorily describe the defendant's expected response. Otherwise, the court would have no "case or controversy" to resolve. Thus, if a plaintiff anticipated a federal defense from a defendant, he or she could simply describe that defense in his or her complaint for declaratory relief, satisfy the rule, and have his or her case heard in federal court. The Mottleys themselves could have used this tactic, by suing the Louisville and Nashville for both declaratory and coercive relief. Justice Frankfurter rejected this possibility in *Skelly Oil*. See *Skelly Oil* ¶¶ [4]-[5].

Second, the courts could have ignored the plaintiff's actual complaint for declaratory relief and asked instead about the hypothetical (*i.e.*, unbrought) complaint for coercive (*i.e.*, non-declaratory) relief that most nearly underlay the plaintiff's complaint for declaratory relief. This is essentially what Justice Frankfurter did in *Skelly Oil*. He ignored Phillips' actual request for declaratory relief and looked instead at the hypothetical action for anticipatory breach that someone in Phillips' position might otherwise have brought. Because that cause of action would not have satisfied the Well-Pleaded Complaint Rule, Phillips could not bring its declaratory action in federal court.

The third approach was not presented in *Skelly Oil*. Under this third approach, a federal court would look *either* to the underlying complaint for coercive relief ("UCCR") that the party seeking declaratory relief (the "declaratory judgment plaintiff") could have brought, *or* to the UCCR that the declaratory judgment defendant could have sought. This approach was not presented in *Skelly Oil* because the declaratory judgment defendant in that case — Skelly Oil — did not appear to have a UCCR of any nature. It simply wanted to be left alone.

Thus, whether Justice Frankfurter himself would have preferred to second or third approach set forth above is not entirely clear. To be sure, he appeared to choose the second approach, but he had no occasion to consider the third approach.

In *Franchise Tax Board*, Justice Brennan was arguably compelled to make that choice. In this case, the UCCR of the declaratory judgment plaintiff (the Board) would have failed the Well-Pleaded Complaint Rule, but the UCCR of the declaratory judgment defendant (the Trust) would have satisfied it. See *Franchise Tax Board* ¶ [20] (noting the Trust's ability to sue under ERISA § 502(a)(3)).

To complicate matters further, however, note the *disposition* of *Franchise Tax Board*. Although the Court appeared to embrace the third approach described above, it nevertheless held that the federal courts could not hear this case. That is, even though the declaratory judgment defendant's UCCR appeared to satisfy the Well-Pleaded Complaint Rule, and even though the Court appeared to contemplate looking to that party's UCCR (as well as the declaratory judgment plaintiff's UCCR), it still excluded the case from federal cognizance. Why?

The answer appears to lie in Substantial Federal Question Test, which we saw at work in such cases as *Merrell Dow Pharmaceuticals, Inc. v. Thompson*. According to this analysis, the federal courts could not hear *Franchise Tax Board* because, under the totality of the circumstances — and particularly as a function of federalism — the case did not belong in federal court. Note the irony, however: if the Trust had sued the Board in federal court under ERISA § 502(a)(3), a federal court would easily have been able to hear the case. Not only would it have satisfied the Well-Pleaded Complaint Rule, but it would even have satisfied *Well Works*.

[16] **Beneficial National Bank v. Anderson**
539 U.S. 1 (2003)

JUSTICE STEVENS delivered the opinion of the Court.

[1] The question in this case is whether an action filed in a state court to recover damages from a national bank for allegedly charging excessive interest in violation of both "the common law usury doctrine" and an Alabama usury statute may be removed to a federal court because it actually arises under federal law. We hold that it may.

I

[2] Respondents are 26 individual taxpayers who made pledges of their anticipated tax refunds to secure short-term loans obtained from petitioner Beneficial National Bank, a national bank chartered under the National Bank Act. Respondents brought suit in an Alabama court against the bank and the two other petitioners that arranged the loans, seeking compensatory and punitive damages on the theory, among others, that the bank's interest rates were usurious. Their complaint did not refer to any federal law.

[3] Petitioners removed the case to the United States District Court for the Middle District of Alabama. In their notice of removal they asserted that the National Bank Act, as amended, 12 U.S.C. § 85, is the exclusive provision governing the rate of interest that a national bank may lawfully charge, that the rates charged to respondents complied with that provision, that 12 U.S.C. § 86, provides the exclusive remedies available against a national bank charging excessive interest, and that the removal statute, 28 U.S.C. § 1441, therefore applied. The District Court denied respondents' motion to remand the case to state court but certified the question whether it had jurisdiction to proceed with the case to the Court of Appeals pursuant to 28 U.S.C. § 1292(b).

[4] A divided panel of the Eleventh Circuit reversed. The majority held that under our "well-pleaded complaint" rule, removal is generally not permitted unless the complaint expressly alleges a federal claim and that the narrow exception from that rule known as the "complete preemption doctrine" did not apply because it could "find no clear congressional intent to permit removal under §§ 85 and 86." [We] granted certiorari.

II

[5] A civil action filed in a state court may be removed to federal court if the claim is one "arising under" federal law. To determine whether the claim arises under federal law, we examine the "well pleaded" allegations of the complaint and ignore potential defenses: "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that

the defense is invalidated by some provision of the Constitution of the United States." *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Thus, a defense that relies on the preclusive effect of a prior federal judgment, *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998), or the pre-emptive effect of a federal statute, *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), will not provide a basis for removal. As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

[6] Congress has, however, created certain exceptions to that rule. For example, the Price-Anderson Act contains an unusual pre-emption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims.

[7] We have also construed § 301 of the Labor Management Relations Act [of] 1947 as not only pre-empting state law but also authorizing removal of actions that sought relief only under state law. *Avco Corp. v. Machinists*, 390 U.S. 557 (1968). We later explained that holding as resting on the unusually "powerful" pre-emptive force of § 301:

> The Court of Appeals held, and we affirmed, that the petitioner's action "arose under" § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law."

Franchise Tax Board (footnote omitted).

[8] Similarly, in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), we considered whether the "complete preemption" approach adopted in *Avco* also supported the removal of state common-law causes of action asserting improper processing of benefit claims under a plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* For two reasons, we held that removal was proper even though the complaint purported to raise only state-law claims. First, the statutory text in § 502(a) not only provided an express federal remedy for the plaintiffs' claims, but also in its jurisdiction subsection, § 502(f), used language similar to the statutory language construed in *Avco,* thereby indicating that the two statutes should be construed in the same way. Second, the legislative history of ERISA

unambiguously described an intent to treat such actions "as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." *Taylor*, 481 U.S. at 65-66.

[9] Thus, a state claim may be removed to federal court in only two circumstances — when Congress expressly so provides, such as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption. When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court. In the two categories of cases where this Court has found complete preemption — certain causes of action under the LMRA and ERISA — the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.

III

[10] Count IV of respondents' complaint sought relief for "usury violations" and claimed that petitioners "charged . . . excessive interest in violation of the common law usury doctrine" and violated "Alabama Code § 8-8-1, *et seq.*, by charging excessive interest." Respondents' complaint thus expressly charged petitioners with usury. *Metropolitan Life, Avco,* and *Franchise Tax Board* provide the framework for answering the dispositive question in this case: Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable. If not, then the complaint does not arise under federal law and is not removable.

[11] Sections 85 and 86 serve distinct purposes. The former sets forth the substantive limits on the rates of interest that national banks may charge. The latter sets forth the elements of a usury claim against a national bank, provides for a 2-year statute of limitations for such a claim, and prescribes the remedies available to borrowers who are charged higher rates and the procedures governing such a claim. If, as petitioners asserted in their notice of removal, the interest that the bank charged to respondents did not violate § 85 limits, the statute unquestionably pre-empts any common-law or Alabama statutory rule that would treat those rates as usurious. The section would therefore provide the petitioners with a complete federal defense. Such a federal defense, however, would not justify removal. Only if Congress intended § 86 to provide the exclusive cause of action for usury claims against national banks would the statute be comparable to the provisions that we construed in the *Avco* and *Metropolitan Life* cases.

[12] In a series of cases decided shortly after the Act was passed, we endorsed that approach. In *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29, 32-33 (1875), we rejected the borrower's attempt to have an entire debt forfeited, as authorized by New York law, stating that the various provisions of §§ 85 and 86 "form a system of regulations . . . [a]ll the parts [of which] are in harmony with each other and cover the entire subject," so that "the State

law would have no bearing whatever upon the case." We also observed that "[i]n any view that can be taken of [§ 86], the power to supplement it by State legislation is conferred neither expressly nor by implication." In *Evans v. National Bank of Savannah*, 251 U.S. 108, 114 (1919), we stated that "federal law . . . completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate."

[13] In addition to this Court's longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action for usury against national banks, this Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from "possible unfriendly State legislation." *Tiffany v. National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874). The same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the "power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), supports the established interpretation of §§ 85 and 86 that gives those provisions the requisite pre-emptive force to provide removal jurisdiction. In actions against national banks for usury, these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441.

[14] The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

[15] Today's opinion takes the view that because the National Bank Act, 12 U.S.C. §§ 85, 86, provides the exclusive cause of action for claims of usury against a national bank, all such claims — even if explicitly pleaded under state law — are to be construed as "aris[ing] under" federal law for purposes of our jurisdictional statutes. This view finds scant support in our precedents and no support whatever in the National Bank Act or any other Act of Congress. I respectfully dissent.

[16] Unless Congress expressly provides otherwise, the federal courts may exercise removal jurisdiction over state-court actions "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). In this case, petitioners invoked as the predicate for removal the district courts' original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." § 1331.

[17] This so-called "arising under" or "federal question" jurisdiction has long been governed by the well-pleaded-complaint rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). A federal question "is presented" when the complaint invokes federal law as the basis for relief. It does not suffice that the facts alleged in support of an asserted state-law claim would *also* support a federal claim. "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Nor does it even suffice that the facts alleged in support of an asserted state-law claim *do not support* a state-law claim and would *only* support a federal claim. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809, n.6 (1986).

[18] Under the well-pleaded-complaint rule, "a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise[,] or that a federal defense the defendant may raise is not sufficient to defeat the claim." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). Of critical importance here, the rejection of a federal defense as the basis for original federal-question jurisdiction applies with equal force when the defense is one of federal pre-emption. "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 116 (1936). "[A] case may not be removed to federal court on the basis of . . . the defense of pre-emption . . . ." *Caterpillar*, 482 U.S. at 393. To be sure, pre-emption requires a state court to *dismiss* a particular claim that is filed under state law, but it does not, as a general matter, provide grounds for *removal*.

[19] This Court has twice recognized exceptions to the well-pleaded-complaint rule, upholding removal jurisdiction notwithstanding the absence of a federal question on the face of the plaintiff's complaint. First, in *Avco Corp. v. Machinists*, 390 U.S. 557 (1968), we allowed removal of a state-court action to enforce a no-strike clause in a collective-bargaining agreement. The complaint concededly did not advance a federal claim, but was subject to a defense of pre-emption under § 301 of the Labor Management Relations Act [of] 1947. The well-pleaded-complaint rule notwithstanding, we treated the plaintiff's state-law contract claim as one arising under § 301, and held that the case could be removed to federal court.

[20] The only support mustered by the *Avco* Court for its conclusion was a statement wrenched out of context from our decision in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957), that "[a]ny state law applied [in a § 301 case] will be absorbed as federal law and will not be an independent source of private rights." To begin with, this statement is entirely unnecessary to the landmark holding in *Lincoln Mills* — that § 301 not only gives federal courts jurisdiction to decide labor relations cases but also supplies them with authority to create the governing substantive law. More importantly, understood in the context of that holding, the quoted passage

in no way supports the proposition for which it is relied upon in *Avco* — that state-law claims relating to labor relations necessarily *arise under* § 301. If one reads *Lincoln Mills* with any care, it is clear beyond doubt that the relevant passage merely confirms that when, in deciding cases arising under § 301, courts employ legal rules that overlap with, or are even explicitly borrowed from, state law, such rules are nevertheless rules of federal law. It is in this sense that "[a]ny state law applied [in a § 301 case] will be absorbed as federal law" — in the sense that federally adopted state rules become federal rules, not in the sense that a state-law claim becomes a federal claim.

[21] Other than its entirely misguided reliance on *Lincoln Mills,* the opinion in *Avco* failed to clarify the analytic basis for its unprecedented act of jurisdictional alchemy. The Court neglected to explain *why* state-law claims that are pre-empted by § 301 of the LMRA are exempt from the strictures of the well-pleaded-complaint rule, nor did it explain *how* such a state-law claim can plausibly be said to "arise under" federal law. Our subsequent opinion in *Franchise Tax Board* struggled to prop up *Avco*'s puzzling holding:

> The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law."

[22] This passage has repeatedly been relied upon by the Court as an explanation for its decision in *Avco.* Of course it is not an explanation at all. It provides nothing more than an account of what *Avco* accomplishes, rather than a justification (unless *ipse dixit* is to count as justification) for the radical departure from the well-pleaded-complaint rule, which demands rejection of the defense of federal pre-emption as a basis for federal jurisdiction. Neither the excerpt quoted above, nor any other fragment of the decision in *Franchise Tax Board,* explains how or why the nonviability (due to pre-emption) of the state-law contract claim in *Avco* magically transformed that claim into one "arising under" federal law.

[23] *Metropolitan Life Ins. Co. v. Taylor*, was our second departure from the prohibition against resting federal "arising under" jurisdiction upon the existence of a federal defense. In that case, Taylor sued his former employer and its insurer, alleging breach of contract and seeking, *inter alia,* reinstatement of certain disability benefits and insurance coverages. Though Taylor invoked no federal law in his complaint, we treated his case as one arising under § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), and upheld the District Court's exercise of removal jurisdiction.

[24] In reaching this conclusion, the *Taylor* Court broke no new analytic ground; its opinion follows the exception established in *Avco* and described in *Franchise Tax Board,* but says nothing to commend that exception to logic or reason. Instead, *Taylor* simply relies on the "clos[e] parallels" between the language of the pre-emptive provision in ERISA and the language of the LMRA provision deemed in *Avco* to be so dramatically pre-emptive as to summon forth a federal claim where none had been asserted. "No more specific reference to the *Avco* rule can be expected," we said, than what was found in § 502(a); and we accordingly concluded that "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." As in *Avco* and *Franchise Tax Board,* no explanation was provided for *Avco*'s abrogation of the rule that "[f]ederal pre-emption is ordinarily a federal defense to the plaintiff's suit[, and as such] it does not appear on the face of a well-pleaded complaint, [nor does it] authorize removal to federal court.

* * *

[25] The difficulty with today's holding, moreover, is not limited to the flimsiness of its precedential roots. As has been noted already, the holding cannot be squared with bedrock principles of removal jurisdiction. . . . . Relatedly, today's holding also represents a sharp break from our long tradition of respect for the autonomy and authority of state courts. Today's decision ignores these venerable principles and effectuates a significant shift in decisional authority from state to federal courts.

[26] In an effort to justify this shift, the Court explains that "[b]ecause §§ 85 and 86 provide the exclusive cause of action for such claims, there is . . . no such thing as a state-law claim of usury against a national bank." But the mere fact that a state-law claim is invalid no more deprives it of its character as a state-law claim which does not raise a federal question, than does the fact that a federal claim is invalid deprive it of its character as a federal claim which does raise a federal question. The proper response to the presentation of a nonexistent claim to a state court is *dismissal,* not the "federalize-and-remove" dance authorized by today's opinion. For even if the Court is correct that the National Bank Act obliterates entirely any state-created right to relief for usury against a national bank, that does not explain how or why the claim of such a right is transmogrified into the claim of a federal right. Congress's mere act of creating a federal right and eliminating all state-created rights *in no way* suggests an expansion of federal jurisdiction so as to wrest from state courts the authority to decide questions of pre-emption under the National Bank Act.

* * *

[28] There may well be good reasons to favor the expansion of removal jurisdiction that petitioners urge and that the Court adopts today. As the United States explains in its *amicus* brief:

> Absent removal, the state court would have only two legitimate options — to recharacterize the claim in federal-law terms or to dismiss the claim altogether. Any plaintiff who truly seeks recovery on that claim would prefer the first option, which would make the propriety of removal crystal clear. A third possibility, however, is that the state court would err and allow the claim to proceed under state law notwithstanding Congress's decision to make the federal cause of action exclusive. The complete pre-emption rule avoids that potential error.

True enough, but inadequate to render today's decision either rational or properly within the authority of this Court. Inadequate for rationality, because there is no more reason to fear state-court error with respect to federal pre-emption accompanied by creation of a federal cause of action than there is with respect to federal pre-emption unaccompanied by creation of a federal cause of action — or, for that matter, than there is with respect to *any* federal defense to a state-law claim. The rational response to the United States' concern is to eliminate the well-pleaded-complaint rule entirely. And inadequate for judicial authority, because it is up to Congress, not the federal courts, to decide when the risk of state-court error with respect to a matter of federal law becomes so unbearable as to justify divesting the state courts of authority to decide the federal matter. Unless and until we receive instruction from Congress that claims preempted under the National Bank Act — in contrast to almost all other claims that are subject to federal pre-emption — "arise under" federal law, we simply lack authority to "avoi[d] . . . potential errors" by permitting removal.

* * *

[28] Today's opinion has succeeded in giving to our *Avco* decision a theoretical foundation that neither *Avco* itself nor *Taylor* provided. Regrettably, that theoretical foundation is itself without theoretical foundation. That is to say, the more general proposition that (1) the existence of a pre-emptive federal cause of action causes the invalid assertion of a state cause of action to raise a federal question, has no more logic or precedent to support it than the very narrow proposition that (2) the LMRA (*Avco*) and statutes modeled after the LMRA (*Taylor*) cause invalid assertions of state causes of action pre-empted by those particular statutes to raise federal questions. Since I believe that, as between an inexplicable narrow holding and an inexplicable broad one, the former is the lesser evil, I would adhere to the approach taken by *Taylor* and on the basis of *stare decisis* simply affirm, without any real explanation, that the LMRA and statutes modeled after it have a "unique pre-emptive force" that (quite illogically) suspends the normal rules of removal jurisdiction. Since no one asserts that the National Bank Act is modeled after the LMRA, the state-law claim pleaded here cannot be removed, and it is left to the state courts to dismiss it. From the Court's judgment to the contrary, I respectfully dissent.

Notes on Beneficial National Bank

Do you understand what happened in this case? The plaintiffs sued (or tried to sue) the bank exclusively under the law of Alabama, and the bank took the position that the *only* cause of action against it that sounded in usury arose under the National Bank Act. For this reason, argued the bank (and agreed the Court), the plaintiffs' action necessarily constituted a suit under the federal statute, which provided the basis for removal. This doctrine of so-called "complete pre-emption" (also known as "*Avco* pre-emption" or the "Artful Pleading Doctrine") is fairly rare in federal law, but you should be aware of it. Most famously, it applies to claims against insurers and employers under ERISA plans. Virtually all such claims must be brought in federal court, no matter how the plaintiff might choose to state them. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), discussed at length in *Beneficial National Bank*.

This doctrine was first seen in *Avco Corp. v. Machinists*, 390 U.S. 557 (1968), which is also discussed at length in *Beneficial National Bank*. (This explains why this form of pre-emption is also known as "*Avco* pre-emption." In this case, a union and an employer had a contract governed by the Labor-Management Relations Act (which we saw at issue in *Lincoln Mills*). As was standard in such contracts, the union had relinquished its right to strike in exchange for a promise by the employer to arbitrate grievances. Notwithstanding this exchange of promises, a union had nevertheless called a strike. Although the LMRA contemplates specific performance of collective bargaining agreements, a separate statute, the Norris-LaGuardia Act, generally prohibits federal judges from enjoining strikes. (The Court had previously held in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962) that the LMRA did not supersede Norris-LaGuardia.) This presented the employer with a dilemma. On the one hand, it wanted its LMRA-governed contract with the union — most particularly the no-strike clause — specifically enforced. On the other hand, it knew that a federal judge almost certainly would not be able to grant the equitable relief it sought. It opted, therefore, to bring a conventional action for breach against the union in *state court* — carefully omitting any reference to federal law (hence another name for this area of the law, the "artful pleading doctrine"). In *Avco*, the Court rejected this tactic, holding that any attempt to enforce the terms of an LMRA-governed agreement necessarily sounds in LMRA § 301(a), however the plaintiff might state it.

The Court ameliorated the dilemma created by *Sinclair Refining* and *Avco* somewhat in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), where it held that a federal court could enforce a no-strike clause in an LMRA-governed where, and only where, the employer has undertaken to arbitrate the specific dispute at issue.

A Quick Note on Diversity Jurisdiction

As you may recall from your course in Civil Procedure, federal courts are authorized to hear virtually any case where the parties reside in two different states and the matter in controversy exceeds $75,000 in value. See 28 U.S.C. § 1332(a)(1). As a matter of fact, however, federal courts routinely refuse to hear cases that sound in probate or domestic relations.

This most likely arises from the inherently local nature of most such proceedings. It may also arise from an unwillingness of federal judges to adjudicate such disputes. Although the statute itself does not allow for this exception, it is widely recognized.

The Supreme Court has obliquely addressed this exception in two cases, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and *Marshall v. Marshall*, 547 U.S. 293 (2006). In both cases, the Court held that the exception, whatever its contours, did not apply to the case at bar. In *Ankenbrandt*, a woman brought suit against her ex-husband alleging various torts against their children. Although much of the evidence in this action would have been relevant to a dispute over custody, the action was in fact not such a dispute, and therefore the exception did not apply. *Marshall v. Marshall* is a similar "near miss" in the area of probate.

[17] **Tafflin v. Levitt**
493 U.S. 455 (1990)

JUSTICE O'CONNOR delivered the opinion of the Court.

[1] This case requires us to decide whether state courts have concurrent jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), as amended.

I

[2] The underlying litigation arises from the failure of Old Court Savings & Loan, Inc., a Maryland savings and loan association, and the attendant collapse of the Maryland Savings-Share Insurance Corp., a state-chartered nonprofit corporation created to insure accounts in Maryland savings and loan associations that were not federally insured. See *Brandenburg v. Seidel*, 859 F.2d 1179, 1181-83 (4th Cir. 1988) (reviewing history of Maryland's savings and loan crisis). Petitioners are nonresidents of Maryland who hold unpaid certificates of deposit issued by Old Court. Respondents are the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Old Court and MSSIC, the accounting firm of Old Court, and the State of Maryland Deposit Insurance Fund Corp., the state-created successor to MSSIC. Petitioners allege various state law causes of action as well as claims under the Securities Exchange Act of 1934, and RICO.

[3] The District Court granted respondents' motions to dismiss, concluding that petitioners had failed to state a claim under the Exchange Act and that, because state courts have concurrent jurisdiction over civil RICO claims, federal abstention was appropriate for the other causes of action because they had been raised in pending litigation in state court. The Court of Appeals for the Fourth Circuit affirmed. The Court of Appeals agreed with the District Court that the Old Court certificates of deposit were not "securities" within the meaning of the Exchange Act, and that petitioners' Exchange Act claims were therefore properly dismissed. The Court of Appeals further held, in reliance on its prior decision in *Brandenburg v. Seidel*, that "a RICO action could be instituted in a state court and that Maryland's 'comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations,' provided a proper basis for the district court to abstain under the authority of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)."

[4] To resolve a conflict among the federal appellate courts and state supreme courts, we granted certiorari limited to the question whether state courts have concurrent jurisdiction over civil RICO claims. We hold that they do and accordingly affirm the judgment of the Court of Appeals.

II

[5] We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. See, *e.g.*, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-26 (1820); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). As we noted in *Claflin*, "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." 93 U.S. at 136; see also *Dowd Box*, 368 U.S. at 507-08 ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule").

[6] This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim. See, *e.g.*, *Claflin*, 93 U.S. at 137 ("Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction"). As we stated in *Gulf Offshore*:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

453 U.S. at 478. The parties agree that these principles, which have "remained unmodified through the years," *Dowd Box*, 368 U.S. at 508, provide the analytical framework for resolving this case.

III

[7] The precise question presented, therefore, is whether state courts have been divested of jurisdiction to hear civil RICO claims "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore*, 453 U.S. at 478. Because we find none of these factors present with respect to civil claims arising under RICO, we hold that state courts retain their presumptive authority to adjudicate such claims.

[8] At the outset, petitioners concede that there is nothing in the language of RICO — much less an "explicit statutory directive" — to suggest that Congress has, by affirmative enactment, divested the state courts of jurisdiction to hear civil RICO claims. The statutory provision authorizing civil RICO claims provides in full:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may* sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (emphasis added). This grant of federal jurisdiction is plainly permissive, not mandatory, for "[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." *Dowd Box*, 368 U.S. at 506. Indeed, "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore*, 453 U.S. at 479.

[9] Petitioners thus rely solely on the second and third factors suggested in Gulf Offshore, arguing that exclusive federal jurisdiction over civil RICO actions is established "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," 453 U.S. at 478.

[10] Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. As the Courts of Appeals that have considered the question have concluded, "[t]he legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as the principal draftsman of RICO has remarked, 'no one even thought of the issue.'" *Brandenburg*, 859 F.2d at 1193 (quoting Flaherty, Two States Lay Claim to RICO, Nat. L.J., May 7, 1984); see also *Lou v. Belzberg*, 834 F.2d 730, 736 (9th Cir. 1987) ("The legislative history provides 'no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether to provide a private right of action'"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even *consider* the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction.

* * *

[11] Petitioners finally urge that state court jurisdiction over civil RICO claims would be clearly incompatible with federal interests. We noted in *Gulf Offshore* that factors indicating clear incompatibility "include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." 453 U.S. at 483-84. Petitioners' primary contention is that concurrent jurisdiction is clearly incompatible with the federal interest in uniform interpretation of federal criminal laws, see 18 U.S.C. § 3231,[2] because state courts would be required to construe the federal crimes that constitute predicate acts defined as "racketeering activity." Petitioners predict that if state courts are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and that the federal courts will consequently lose control over the orderly and uniform development of federal criminal law.

[12] We perceive no "clear incompatibility" between state court jurisdiction over civil RICO actions and federal interests. As a preliminary matter, concurrent jurisdiction over § 1964(c) suits is clearly not incompatible with § 3231 itself, for civil RICO claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions — uniform or otherwise. See *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987) (civil RICO intended to be primarily remedial rather than punitive).

[13] More to the point, however, our decision today creates no significant danger of inconsistent application of federal criminal law. Although petitioners' concern with the need for uniformity and consistency of federal criminal law is well taken, federal courts, pursuant to § 3231, would retain full authority and responsibility for the interpretation and application of federal criminal law, for they would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law. State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, and will not, in any event, result in any more inconsistency than that which a multimembered, multitiered federal judicial system already creates.

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[2]Title 18 U.S.C. § 3231 provides in full:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

[14] Moreover, contrary to petitioners' fears, we have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. See 18 U.S.C. § 1961(1)(A) (listing state law offenses constituting predicate acts); *Gulf Offshore*, 453 U.S. at 484 ("State judges have greater expertise in applying" laws "whose governing rules are borrowed from state law"). To hold otherwise would not only denigrate the respect accorded coequal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction," *Dowd Box*, 368 U.S. at 508. Indeed, it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found no inconsistency in subjecting civil RICO claims to adjudication by arbitration. See *Shearson/American Express*, 482 U.S. at 239 (rejecting argument that "RICO claims are too complex to be subject to arbitration" and that "there is an irreconcilable conflict between arbitration and RICO's underlying purposes").

* * *

[15] For all of the above reasons, we hold that state courts have concurrent jurisdiction to consider civil claims arising under RICO. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise. The judgment of the Court of Appeals is accordingly

Affirmed.

[The concurring opinion of Justice White is omitted.]

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring.

[16] I join the opinion of the Court, addressing the issues before us on the basis argued by the parties, which has included acceptance of the dictum in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Such dicta, when repeatedly used as the point of departure for analysis, have a regrettable tendency to acquire the practical status of legal rules. I write separately, before this one has become too entrenched, to note my view that in one respect it is not a correct statement of the law, and in another respect it may not be.

[17] State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, but because "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two

jurisdictions are not foreign to each other . . . ." *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); see also *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 221-23 (1916).

[18] It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction — an exercise of what one of our earliest cases referred to as "the power of congress to *withdraw*" federal claims from state-court jurisdiction. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820) (emphasis added); *Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor*, 266 U.S. 200, 208 (1924) ("As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction").

[19] As an original proposition, it would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity, at least expressly. That was the view of Alexander Hamilton:

> When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

The Federalist No. 82 (E. Bourne ed. 1947). Although as early as *Claflin*, and as late as *Gulf Offshore*, we have *said* that the exclusion of concurrent state jurisdiction could be achieved by implication, the only cases in which to my knowledge we have acted upon such a principle are those relating to the Sherman Act and the Clayton Act — where the full extent of our analysis was the less than compelling statement that provisions giving the right to sue in United States District Court "show that [the right] is to be exercised *only* in a 'court of the United States.'" *General Investment Co. v. Lake Shore & Michigan Southern R. Co.*, 260 U.S. 261, 287 (1922) (emphasis added). In the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought "only" in federal court, Investment Company Act of 1940, as amended; that the jurisdiction of the federal courts shall be "exclusive," Securities Exchange Act of 1934, as amended; Natural Gas Act of 1938; Employee Retirement Income Security Act of 1974; or indeed even that the jurisdiction of the federal courts shall be "exclusive of the courts of the States," 18 U.S.C. § 3231 (criminal cases); 28 U.S.C. § 1333 (admiralty, maritime, and prize cases), § 1334 (bankruptcy cases), § 1338 (patent, plant variety protection, and copyright cases), § 1351 (actions against consuls or vice consuls of foreign states), § 1355 (actions for recovery or enforcement of fine, penalty, or forfeiture incurred under Act of Congress), § 1356 (seizures on land or water not within admiralty and maritime jurisdiction).

[20] Assuming, however, that exclusion by implication is possible, surely what is required is implication in the text of the statute, and not merely, as the second part of the *Gulf Offshore* dictum would permit, through "unmistakable implication from legislative history." 453 U.S. at 478. Although *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), after concluding that the statute "does not state nor even suggest that [federal] jurisdiction shall be

exclusive," *id.* at 506, proceeded quite unnecessarily to examine the legislative history, it did so to reinforce rather than contradict the conclusion it had already reached. We have never found state jurisdiction excluded by "unmistakable implication" from legislative history. It is perhaps harmless enough to say that it can be, since one can hardly imagine an "implication from legislative history" that is "unmistakable" — *i.e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President — unless the proposition is embodied in statutory text to which those parties have given assent. But harmless or not, it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it with unmistakable clarity. What is needed to oust the States of jurisdiction is congressional *action* (*i.e.*, a provision of law), not merely congressional discussion.

[21] It is perhaps also true that implied preclusion can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme. That is conceivably what was meant by the third part of the *Gulf Offshore* dictum, "clear incompatibility between state-court jurisdiction and federal interests." 453 U.S. at 478. If the phrase is interpreted more broadly than that, however — if it is taken to assert some power on the part of this Court to exclude state-court jurisdiction when systemic federal interests make it undesirable — it has absolutely no foundation in our precedent.

* * *

[22] In sum: As the Court holds, the RICO cause of action meets none of the three tests for exclusion of state-court jurisdiction recited in *Gulf Offshore*. Since that is so, the proposition that meeting any one of the tests would have sufficed is dictum here, as it was there. In my view meeting the second test is assuredly not enough, and meeting the third may not be.

Notes on Tafflin

As you may recall from our discussion of *Sheldon v. Sill*, the Constitution does not require Congress to establish any inferior federal courts at all. If Congress had not done so, where would federal criminal prosecutions have taken place? The obvious answer would seem to be state court. In other words, we could have seen federal prosecutors bringing their cases before judges and juries called together by the states.

This leads to the separate question of whether the states could have refused to allow Congress to use their courts in this manner. As you can infer from cases such as *Tafflin*, but more particularly from the next case, *Testa v. Katt*, the states probably could *not* refuse. But query what the right answer should be.

Testa v. Katt
330 U.S. 386 (1947)

MR. JUSTICE BLACK delivered the opinion of the Court.

[1] Section 205(e) of the Emergency Price Control Act provides that a buyer of goods above the prescribed ceiling price may sue the seller "in any court of competent jurisdiction" for not more than three times the amount of the overcharge plus costs and a reasonable attorney's fee. Section 205(c) provides that federal district courts shall have jurisdiction of such suits "concurrently with State and Territorial courts." Such a suit under § 205(e) must be brought "in the district or county in which the defendant resides or has a place of business . . . ."

[2] The respondent was in the automobile business in Providence, Providence County, Rhode Island. In 1944 he sold an automobile to petitioner Testa, who also resides in Providence, for $1100, $210 above the ceiling price. The petitioner later filed this suit against respondent in the State District Court in Providence. Recovery was sought under § 205(e). The court awarded a judgment of treble damages and costs to petitioner. On appeal to the State Superior Court, where the trial was *de novo*, the petitioner was again awarded judgment, but only for the amount of the overcharge plus attorney's fees. . . . . On appeal, the State Supreme Court reversed. It interpreted § 205(e) to be "a penal statute in the international sense." It held that an action for violation of § 205(e) could not be maintained in the courts of that State. The State Supreme Court rested its holding on its earlier decision in *Robinson v. Norato*, 43 A.2d 467, 468 (R.I. 1945), in which it had reasoned that: A state need not enforce the penal laws of a government which is "foreign in the international sense"; § 205(e) is treated by Rhode Island as penal in that sense; the United States is "foreign" to the State in the "private international" as distinguished from the "public international" sense; hence Rhode Island courts, though their jurisdiction is adequate to enforce similar Rhode Island "penal" statutes, need not enforce § 205(e). Whether state courts may decline to enforce federal laws on these grounds is a question of great importance. For this reason, and because the Rhode Island Supreme Court's holding was alleged to conflict with this Court's previous holding in *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912), we granted certiorari.

[3] For the purposes of this case, we assume, without deciding, that § 205(e) is a penal statute in the "public international," "private international," or any other sense. So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI of the Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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."

[4] It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws. Such an assumption represents an erroneous evaluation of the statutes of Congress and the prior decisions of this Court in their historic setting. Those decisions establish that state courts do not bear the same relation to the United States that they do to foreign countries. The first Congress that convened after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws,[4] and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.

[5] Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claflin v. Houseman*, 93 U.S. 130 (1876). The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, "any Thing in the Constitution or Laws of any State to the contrary notwithstanding." It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. And the Court stated that "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." *Id.* at 137.

[6] The *Claflin* opinion thus answered most of the arguments theretofore advanced against the power and duty of state courts to enforce federal penal laws. And since that decision, the remaining areas of doubt have been steadily narrowed. There have been statements in cases concerned with the obligation of states to give full faith and credit to the proceedings of sister states which suggested a theory contrary to that pronounced in the Claflin opinion. But when in *Mondou* this Court was presented with a case testing the power and duty of states to enforce federal laws, it found the solution in the broad principles announced in the *Claflin* opinion.

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[4]Judiciary Act of 1789 (suits by aliens for torts committed in violation of federal laws and treaties; suits by the United States).

[7] The precise question in the *Mondou* case was whether rights arising under the Federal Employers' Liability Act could "be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion . . . ." *Id.* at 46. The Supreme Court of Connecticut had decided that they could not. Except for the penalty feature, the factors it considered and its reasoning were strikingly similar to that on which the Rhode Island Supreme Court declined to enforce the federal law here involved. But this Court held that the Connecticut court could not decline to entertain the action. The contention that enforcement of the congressionally created right was contrary to Connecticut policy was answered as follows:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

Id. at 57.

[8] So here, the fact that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a "valid excuse." *Cf. Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 388 (1929). For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which chiefly relied upon the *Claflin* and *Mondou* precedents, this Court stated that a state court cannot "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916).

[9] The Rhode Island court in its *Robinson* decision on which it relies cites cases of this Court which have held that states are not required by the full faith and credit clause of the Constitution to enforce judgments of the courts of other states based on claims arising out of penal statutes. But those holdings have no relevance here, for this case raises no full faith and credit question. Nor need we consider in this case prior decisions to the effect that federal courts are not required to enforce state penal laws. For whatever consideration they may be entitled in the field in which they are relevant, those decisions did not bring before us our instant problem of the effect of the supremacy clause on the relation of federal laws to state courts. Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law.

[10] It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act. Thus the Rhode Island courts have jurisdiction adequate and

appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim. See *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230 (1934); and compare *Herb v. Pitcairn*, 324 U.S. 117 (1945). The case is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

Notes on Testa

1. The general rule is that state courts must hear a federal causes of action unless a "neutral rule of judicial administration" explains why they may not. For a simple example of such a rule, imagine a court that sat only in equity, and therefore literally had no accommodations for a jury — no box, for example. If Congress authorized an action at law in a particular statute, such a court could refuse to hear a case under that statute, on the neutral ground that it was constituted solely for actions in equity.

2. There is a series of cases in which state courts declined to hear cases under the Federal Employers Liability Act ("FELA"), several of which are referred to in *Testa*. A few of these cases involved attempts to reject FELA cases on the ground of *forum non conveniens*. This possibility might present itself, for example, if both the plaintiff and the defendant were from other states, and the alleged injury occurred in another state as well. The Court would allow state courts to reject such cases on grounds of *forum non conveniens* if and only if those courts would reject similar *non-federal* cases on the same grounds. Compare *Douglas v. New York, N.H. & H. R. Co.*, 279 U.S. 377 (1929) (New York court, Connecticut plaintiff, Connecticut defendant, Connecticut injury) (state court allowed to reject FELA case), with *McKnett v. St. Louis & S.F. R. Co.*, 292 U.S. 230 (1934) (Alabama court, Tennessee plaintiff, Missouri defendant, Tennessee injury) (state court *not* allowed to reject FELA case because it would hear a similar non-federal case). As Justice Brandeis explained in *McKnett*, "[A] state may not discriminate against rights arising under federal law." 292 U.S. at 234.

3. Unlike all or virtually all other federal causes of action, a FELA case brought in state court is not removable. See 28 U.S.C. § 1445.

Dice v. Akron, Canton & Youngstown R. Co.
342 U.S. 359 (1952)

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. JUSTICE DOUGLAS.

[1] Petitioner, a railroad fireman, was seriously injured when an engine in which he was riding jumped the track. Alleging that his injuries were due to respondent's negligence, he brought this action for damages under the Federal Employers' Liability Act in an Ohio court of common pleas. Respondent's defenses were (1) a denial of negligence and (2) a written document signed by petitioner purporting to release respondent in full for $924.63. Petitioner

admitted that he had signed several receipts for payments made him in connection with his injuries but denied that he had made a full and complete settlement of all his claims. He alleged that the purported release was void because he had signed it relying on respondent's deliberately false statement that the document was nothing more than a mere receipt for back wages.

[2] After both parties had introduced considerable evidence the jury found in favor of petitioner and awarded him a $25,000 verdict. The trial judge later entered judgment notwithstanding the verdict. In doing so he reappraised the evidence as to fraud, found that petitioner had been "guilty of supine negligence" in failing to read the release, and accordingly held that the facts did not "sustain either in law or equity the allegations of fraud by clear, unequivocal and convincing evidence." This judgment notwithstanding the verdict was reversed by the Court of Appeals of Summit County, Ohio, on the ground that under federal law, which controlled, the jury's verdict must stand because there was ample evidence to support its finding of fraud. The Ohio Supreme Court, one judge dissenting, reversed the Court of Appeals' judgment and sustained the trial court's action, holding that: (1) Ohio, not federal, law governed; (2) under that law petitioner, a man of ordinary intelligence who could read, was bound by the release even though he had been induced to sign it by the deliberately false statement that it was only a receipt for back wages; and (3) under controlling Ohio law factual issues as to fraud in the execution of this release were properly decided by the judge rather than by the jury. We granted certiorari because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act.

[3] *First.* We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law.

[4] *Second.* In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. And this Ohio rule is out of harmony with modern judicial and legislative practice to

relieve injured persons from the effect of releases fraudulently obtained. We hold that the correct federal rule is that announced by the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court — a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release. The trial court's charge to the jury correctly stated this rule of law.

[5] *Third.* Ohio provides and has here accorded petitioner the usual jury trial of factual issues relating to negligence. But Ohio treats factual questions of fraudulent releases differently. It permits the judge trying a negligence case to resolve all factual questions of fraud "other than fraud in the factum." The factual issue of fraud is thus split into fragments, some to be determined by the judge, others by the jury.

[6] It is contended that since a state may consistently with the Federal Constitution provide for trial of cases under the Act by a nonunanimous verdict, *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916), Ohio may lawfully eliminate trial by jury as to one phase of fraud while allowing jury trial as to all other issues raised. The *Bombolis* case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act. But Ohio has not done this. It has provided jury trials for cases arising under the federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury.

[7] We have previously held that "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence" and that it is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act." *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943). We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence "is to take away a goodly portion of the relief which Congress has afforded them." It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio has here used. *Brown v. Western R. Co.*, 338 U.S. 294 (1949).

[8] The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor. The judgment of the Court of Appeals of Summit County, Ohio, was correct and should not have been reversed by the Supreme Court of Ohio. The cause is reversed and remanded to the Supreme Court of Ohio for further action not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON join, concurring for reversal but dissenting from the Court's opinion.

[9] Ohio, as do many other States, maintains the old division between law and equity as to the mode of trying issues, even though the same judge administers both. The Ohio Supreme Court has told us what, on one issue, is the division of functions in all negligence actions brought in the Ohio courts: "Where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured." Thus, in all cases in Ohio, the judge is the trier of fact on this issue of fraud, rather than the jury. It is contended that the Federal Employers' Liability Act requires that Ohio courts send the fraud issue to a jury in the cases founded on that Act. To require Ohio to try a particular issue before a different fact-finder in negligence actions brought under the Employers' Liability Act from the fact-finder on the identical issue in every other negligence case disregards the settled distribution of judicial power between Federal and State courts where Congress authorizes concurrent enforcement of federally-created rights.

[10] It has been settled ever since the *Second Employers' Liability Cases*, 223 U.S. 1 (1912) [*Mondou*], that no State which gives its courts jurisdiction over common law actions for negligence may deny access to its courts for a negligence action founded on the Federal Employers' Liability Act. Nor may a State discriminate disadvantageously against actions for negligence under the Federal Act as compared with local causes of action in negligence. *McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 234 (1934); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 4 (1950). Conversely, however, simply because there is concurrent jurisdiction in Federal and State courts over actions under the Employers' Liability Act, a State is under no duty to treat actions arising under that Act differently from the way it adjudicates local actions for negligence, so far as the mechanics of litigation, the forms in which law is administered, are concerned. This surely covers the distribution of functions as between judge and jury in the determination of the issues in a negligence case.

[11] In 1916 the Court decided without dissent that States in entertaining actions under the Federal Employers' Liability Act need not provide a jury system other than that established for local negligence actions. States are not compelled to provide the jury required of Federal courts by the Seventh Amendment. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916). In the thirty-six years since this early decision after the enactment of the Federal Employers' Liability Act, the *Bombolis* case has often been cited by this Court but never questioned. Until today its significance has been to leave to States the choice of the fact-finding tribunal in all negligence actions, including those arising under the Federal Act. . . . .

[12] Although a State must entertain negligence suits brought under the Federal Employers' Liability Act if it entertains ordinary actions for negligence, it need conduct them only in the way in which it conducts the run of negligence litigation. The *Bombolis* case directly establishes that the Employers' Liability Act does not impose the jury requirements of the Seventh Amendment on the States *pro tanto* for Employers' Liability litigation. If its reasoning means anything, the *Bombolis* decision means that, if a State chooses not to have a jury at all, but to leave questions of fact in all negligence actions to a court, certainly the Employers' Liability

Act does not require a State to have juries for negligence actions brought under the Federal Act in its courts. Or, if a State chooses to retain the old double system of courts, common law and equity — as did a good many States until the other day, and as four States still do — surely there is nothing in the Employers' Liability Act that requires traditional distribution of authority for disposing of legal issues as between common law and chancery courts to go by the board. And, if States are free to make a distribution of functions between equity and common law courts, it surely makes no rational difference whether a State chooses to provide that the same judge preside on both the common law and the chancery sides in a single litigation, instead of in separate rooms in the same building. So long as all negligence suits in a State are treated in the same way, by the same mode of disposing equitable, non-jury, and common law, jury issues, the State does not discriminate against Employers' Liability suits nor does it make any inroad upon substance.

[13] Ohio and her sister States with a similar division of functions between law and equity are not trying to evade their duty under the Federal Employers' Liability Act; nor are they trying to make it more difficult for railroad workers to recover, than for those suing under local law. The States merely exercise a preference in adhering to historic ways of dealing with a claim of fraud; they prefer the traditional way of making unavailable through equity an otherwise valid defense. The State judges and local lawyers who must administer the Federal Employers' Liability Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases. Nothing in the Employers' Liability Act or in the judicial enforcement of the Act for over forty years forces such judicial hybridization upon the States. The fact that Congress authorized actions under the Federal Employers' Liability Act to be brought in State as well as in Federal courts seems a strange basis for the inference that Congress overrode State procedural arrangements controlling all other negligence suits in a State, by imposing upon State courts to which plaintiffs choose to go the rules prevailing in the Federal courts regarding juries. Such an inference is admissible, so it seems to me, only on the theory that Congress included as part of the right created by the Employers' Liability Act an assumed likelihood that trying all issues to juries is more favorable to plaintiffs. At least, if a plaintiff's right to have all issues decided by a jury rather than the court is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act," the *Bombolis* case should be overruled explicitly instead of left as a derelict bound to occasion collisions on the waters of the law. . . . .

[14] Even though the method of trying the equitable issue of fraud which the State applies in all other negligence cases governs Employers' Liability cases, two questions remain for decision: Should the validity of the release be tested by a Federal or a State standard? And if by a Federal one, did the Ohio courts in the present case correctly administer the standard? If the States afford courts for enforcing the Federal Act, they must enforce the substance of the right given by Congress. They cannot depreciate the legislative currency issued by Congress — either expressly or by local methods of enforcement that accomplish the same result. In order to

prevent diminution of railroad workers' nationally-uniform right to recover, the standard for the validity of a release of contested liability must be Federal. . . . .

[15] The judgment of the Ohio Supreme Court must be reversed for it applied the State rule as to validity of releases, and it is not for us to interpret Ohio decisions in order to be assured that on a matter of substance the State and Federal criteria coincide. Moreover, we cannot say with confidence that the Ohio trial judge applied the Federal standard correctly. He duly recognized that "the Federal law controls as to the validity of a release pleaded and proved in bar of the action, and the burden of showing that the alleged fraud vitiates the contract or compromise or release rests upon the party attacking the release." And he made an extended analysis of the relevant circumstances of the release, concluding, however, that there was no "clear, unequivocal and convincing evidence" of fraud. Since these elusive words fail to assure us that the trial judge followed the Federal test and did not require some larger quantum of proof, we would return the case for further proceedings on the sole question of fraud in the release.

Notes on Dice

1. Reverse-*Erie*? A case like *Dice* presents what one might describe as the "reverse-*Erie*" situation — a *federal* cause of action in *state court*, rather than a *state* cause of action in *federal* court. As you may recall from your course in Civil Procedure, the usual rule in *Erie* situations (at least in theory) is "state substance, federal procedure." Given that predicate, one might expect that, in the reverse-*Erie* context, the usual rule would be "federal substance, state procedure." See Margaret G. Stewart, Federalism and Judicial Supremacy: Control of State Judicial Decision-Making, 68 Chi.-Kent L. Rev. 431, 431 (1992). If that were the case, however, perhaps *Dice* should have gone the other way. After all, Ohio had the *procedure* of trying allegations of fraud to the bench, even if they arose as part of an action at law. If Congress had "taken state courts as it found them," would it not have allowed Ohio to maintain this procedure?

2. As you can see from *Dice*, state courts hearing federal causes of action are generally permitted to keep their own rules of procedure, unless adherence to such a rule "so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest." *Felder v. Casey*, 487 U.S. 131, 151 (1988).

In re Tarble
80 U.S. (13 Wall.) 397 (1871)

ERROR to the Supreme Court of Wisconsin.

[1] This was a proceeding on *habeas corpus* for the discharge of one Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

[2] The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that State to issue the writ of *habeas corpus* upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. It was issued in this case upon the petition of the father of Tarble, in which he alleged that his son, who had enlisted under the name of Frank Brown, was confined and restrained of his liberty by Lieutenant Stone, of the United States army, in the city of Madison, in that State and county; that the cause of his confinement and restraint was that he had, on the 20th of the preceding July, enlisted, and been mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlistment; that the same was made without the knowledge, consent, or approval of the petitioner; and was, therefore, as the petitioner was advised and believed, illegal; and that the petitioner was lawfully entitled to the custody, care, and services of his son.

[3] The writ was directed to the officer thus named, commanding him to have Tarble, together with the cause of his imprisonment and detention, before the commissioner, at the latter's office, in the city of Madison, immediately after the receipt of the writ.

[4] The officer thereupon produced Tarble before the commissioner and made a return in writing to the writ, protesting that the commissioner had no jurisdiction in the premises, and stating, as the authority and cause for the detention of the prisoner, that he, the officer, was a first lieutenant in the army of the United States, and by due authority was detailed as a recruiting officer at the city of Madison, in the State of Wisconsin, and as such officer had the custody and command of all soldiers recruited for the army at that city; that on the 27th of July preceding, the prisoner, under the name of Frank Brown, was regularly enlisted as a soldier in the army of the United States for the period of five years, unless sooner discharged by proper authority; that he then duly took the oath required in such case by law and the regulations of the army, in which oath he declared that he was of the age of twenty-one years, and thereby procured his enlistment, and was on the same day duly mustered into the service of the United States; that subsequently he deserted the service, and being retaken was then in custody and confinement under charges of desertion, awaiting trial by the proper military authorities.

[5] To this return the petitioner filed a reply, denying, on information and belief, that the prisoner was ever duly or lawfully enlisted or mustered as a soldier into the army of the United States, or that he had declared on oath that he was of the age of twenty-one years, and alleging that the prisoner was at the time of his enlistment under the age of eighteen years, and on information and belief that he was enticed into the enlistment, which was without the knowledge, consent, or approval of the petitioner; that the only oath taken by the prisoner at the time of his enlistment was an oath of allegiance; and that the petitioner was advised and believed that the prisoner was not, and never had been, a deserter from the military service of the United States.

[6] On the 12th of August, to which day the hearing of the petition was adjourned, the commissioner proceeded to take the testimony of different witnesses produced before him, which related principally to the enlistment of the prisoner, the declarations which he made as to his age,

and the oath he took at the time, his alleged desertion, the charges against him, his actual age, and the absence of any consent to the enlistment on the part of his father.

[7] The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

[8] Afterwards, in September of the same year, that officer applied to the Supreme Court of the State for a *certiorari*, setting forth in his application the proceedings before the commissioner and his ruling thereon. The *certiorari* was allowed, and in obedience to it the proceedings had before the commissioner were returned to the Supreme Court. These proceedings consisted of the petition for the writ, the return of the officer, the reply of the petitioner, and the testimony, documentary and parol, produced before the commissioner.

[9] Upon these proceedings the case was duly argued before the Supreme Court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner discharging the prisoner. This judgment was now before this court for examination on writ of error prosecuted by the United States.

* * *

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

[10] The important question is presented by this case, whether a State court commissioner has jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial, and conviction, for offences against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to

interfere with parties in custody, under judicial sentence, when the National court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon *habeas corpus*, in all cases, whether that court ever had such jurisdiction. . . . .

[11] [I]f the power asserted by that State court existed, no offence against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned; that if that power existed in that State court, it belonged equally to every other State court in the Union where a prisoner was within its territorial limits; and, as the different State courts could not always agree, it would often happen that an act, which was admitted to be an offence and justly punishable in one State, would be regarded as innocent, and even praiseworthy in another, and no one could suppose that a government, which had hitherto lasted for seventy years, "enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 515 (1859).

* * *

[12] [As we observed in an earlier case, if the judges of Wisconsin] "possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."

[13] It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement.

Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding.'" Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. . . . .

[14] Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

[15] Now, among the powers assigned to the National government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of *habeas corpus* on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the National troops without their commanders being subjected to

constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of *habeas corpus* for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on *habeas corpus* are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

[16] It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the National legislature.

* * *

[17] This limitation upon the power of State tribunals and State officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of *habeas corpus* in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and effect in such cases than would be that of State tribunals and State officers.

[18] It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of *habeas corpus* for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no

writ of *habeas corpus* issued by him could pass over the line which divided the two sovereignties.

* * *

JUDGMENT REVERSED.

The CHIEF JUSTICE, dissenting.

[19] I cannot concur in the opinion just read. I have no doubt of the right of a State court to inquire into the jurisdiction of a Federal court upon *habeas corpus*, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry.

[20] I have still less doubt, if possible, that a writ of *habeas corpus* may issue from a State court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The State court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.

[21] To deny the right of State courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by *habeas corpus* against arbitrary imprisonment in a large class of cases; and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution. That instrument expressly declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."

Notes on Tarble

1. Was this case rightly decided? As we noted early in the course, Congress is under no obligation to establish any inferior federal courts at all, and the original jurisdiction of the Supreme Court of the United States is minuscule. If this is so, and if Congress were to establish no inferior federal courts, and if state courts as well are precluded from granting writs of *habeas corpus* to people in federal custody, then what becomes of the writ?

2. As a matter of practical wisdom, however, *Tarble's Case* makes sense. If state judges could grant writs of *habeas corpus* to people in federal custody — most particularly, to people in the federal military — then federal armies could not move through the states without being subject to the jurisdiction of potentially hostile local judiciaries.

3. Perhaps one solution to the foregoing dilemma is to classify *Tarble's Case* as an example of "defeasible" constitutional law. Arguably, such an animal should not exist. Arguably, a judicial construction of the Constitution should have the same juridical standing as the Constitution itself. That is, it should be "defeasible" only by constitutional amendment, or by virtue of being overruled in due course by a properly constituted court. But there are (at least arguably) a variety of forms of defeasible constitutional law — "constitutional common law," if you will. See generally Henry P. Monaghan, The Supreme Court, 1974 Term, Forward: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). Consider, for example, the Dormant Commerce Clause. When courts adjudicate cases implicating the Dormant Commerce Clause, they are (in theory) vindicating Congress' desire *not* to regulate a particular aspect of interstate commerce. But it is well settled that Congress may act *after* a decision under the Dormant Commerce Clause and authorize *precisely* the behavior that the court previously struck down (so long as that behavior doesn't violate another provision of the Constitution). Thus, decisions under the Dormant Commerce Clause, like decisions generally under the common law, are "defeasible" by the relevant legislature, in this case Congress.

[18] **Erie R. Co. v. Tompkins**
304 U.S. 64 (1938)

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

[1] The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.

[2] Tompkins, a citizen of Pennsylvania, was injured on a dark [and stormy] night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New York, which had jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by a jury.

[3] The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way — that is a longitudinal pathway as distinguished from a crossing — are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

[4] The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train.

[5] The Erie had contended that application of the Pennsylvania rule was required, among other things, by § 34 of the Federal Judiciary Act of September 24, 1789, which provides:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

[6] Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.

[7] *First. Swift v. Tyson* held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is — or should be; and that, as there stated by Mr. Justice Story:

> the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

[8] The Court in applying the rule of § 34 to equity cases, in *Mason v. United States*, 260 U.S. 545, 559 (1923), said: "The statute . . . is merely declarative of the rule which would exist in the absence of the statute."[2] The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given § 34, and as to the soundness of the rule which it introduced. But it was the more recent research of a

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[2]In *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831), it was stated that section 34 "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined."

competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[5]

[9] Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928). There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for western Kentucky to enjoin competition by the Black and White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift v. Tyson* had been applied, affirmed the decree.

[10] *Second.* Experience in applying the doctrine of *Swift v. Tyson* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

[11] On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

[12] The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within

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[5]Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923).

the State, the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.

[13] In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another State, as was done in the *Taxicab* case.

[14] The injustice and confusion incident to [this doctrine] have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

[15] *Third.* Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893), against ignoring the Ohio common law of fellow servant liability:

> I am aware that what has been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States —

> independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

[16] The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

> but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. [The] only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

[17] Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

[18] *Fourth.* The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 160 A. 859 (Pa. 1932), the only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law.[24] In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law.

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[24]Tompkins also contended that the alleged rule of the *Falchetti* case is not in any event applicable here because he was struck at the intersection of the longitudinal pathway and a transverse crossing. The court below found it unnecessary to consider this contention, and we leave the question open.

[19] [Editor's new paragraph.] As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

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

[The opinion of Justice Butler, joined by Justice McReynolds, concurring on other grounds, is omitted.]

MR. JUSTICE REED.

[20] I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift v. Tyson*, and in the reasoning of the majority opinion except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

[21] The "doctrine of *Swift v. Tyson*," as I understand it, is that the words "the laws," as used in § 34 of the Federal Judiciary Act of September 24, 1789, do not include in their meaning "the decisions of the local tribunals." Mr. Justice Story, in deciding that point, said: "Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

[22] To decide the case now before us and to "disapprove" the doctrine of *Swift v. Tyson* requires only that we say that the words "the laws" include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

[23] The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing "unconstitutional" which required the overruling of *Swift v. Tyson*, for he said in the very opinion quoted by the majority, "I should leave *Swift v. Tyson* undisturbed[,] but I would not allow it to spread the assumed dominion into new fields." If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. The

Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

[24] In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution.

[25] There is no occasion to discuss further the range or soundness of these few phrases of the opinion. It is sufficient now to call attention to them and express my own non-acquiescence.

Notes on Erie

1. How would you have resolved this case? Why?

2. Consider the slip of paper that Charles Warren found in the attic of the Capitol. Warren interpreted Oliver Ellsworth's changes as *stylistic only*, that is, as merely capturing the principles Ellsworth had in mind in a more succinct form. See ¶ [8] & n.5. Does this establish the correctness of Warren's interpretation of § 34 of the Judiciary Act? Let's assume you found Warren's interpretation of Ellsworth's own intentions persuasive. Would you attribute these private understandings to *other Senators*? To members of *the House*? To *the President*? Can we reasonably see Ellsworth as a stand-in for any good lawyer in the late eighteenth century?

3. Now please assume that Congress as a whole, together with the President, in fact saw the ultimate language of the section as a restatement of the language Ellsworth marked out. Does Justice Brandeis' interpretation of that language follow? Must we interpret the states' "unwritten or common law now in use" to include holdings in specific cases arising under the common law? *Should* we? What *is* the common law? Is it a series of holdings in a specific legal tradition, or is it *the tradition itself*? To put the matter in another way, when a court sits in the tradition of the common law, does it "make" law, or does it "find" it?

4. Is *stare decisis* consistent with the concept of "finding" law? Are *appellate courts* consistent with this concept? How about analogic reasoning?

5. As you can see, § 34 pertains only to "trials at common law." Yet in *Mason v. United States*, 260 U.S. 545 (1923), the Court applied it to actions *in equity*, telling us that § 34 "is merely declarative of the rule which would exist in the absence of statute." What could the Court have meant by that?

6. Is *Erie* correct because it interprets *the Constitution* correctly? If Congress wanted to, could it authorize federal courts to create and apply "federal common law" when they hear cases in diversity? If you're inclined to answer this question in the negative, please keep in mind that the Constitution authorizes federal courts to hear cases in admiralty, and federal courts

began developing a common law of admiralty immediately after Congress gave them nothing more than *statutory jurisdiction* to hear such cases. If this is so, why couldn't Congress do the same with diversity? Is that jurisdiction somehow different from admiralty? Have the federal courts been abusing the Constitution for over two centuries by developing a common law of admiralty? One could perhaps resolve this dilemma by arguing that admiralty pertains to waters over which no sovereign but the United States has jurisdiction, whereas cases in diversity implicate another set of sovereigns — the states.

7. To what extent does *Erie* actually eliminate "disuniformity"? May a plaintiff not often sue a defendant in a state *of the plaintiff's choosing*? With *Erie* (1938), *Klaxon v. Stentor Electric Mfg.* (1941) and *International Shoe* (1945), isn't "forum shopping" still a very real phenomenon, just in a different form? Have the Supreme Court's recent revisions in the area of personal jurisdiction reduced the opportunity for forum shopping?

[19] **Clearfield Trust Co. v. United States**
318 U.S. 363 (1943)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

[1] On April 28, 1936, a check was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia to the order of Clair A. Barner in the amount of $24.20. It was dated at Harrisburg, Pennsylvania, and was drawn for services rendered by Barner to the Works Progress Administration. The check was placed in the mail addressed to Barner at his address in Mackeyville, Pa. Barner never received the check. Some unknown person obtained it in a mysterious manner and presented it to the J.C. Penney Co. store in Clearfield, Pa., representing that he was the payee and identifying himself to the satisfaction of the employees of J.C. Penney Co. He endorsed the check in the name of Barner and transferred it to J.C. Penney Co. in exchange for cash and merchandise. Barner never authorized the endorsement nor participated in the proceeds of the check. J.C. Penney Co. endorsed the check over to the Clearfield Trust Co. which accepted it as agent for the purpose of collection and endorsed it as follows: "Pay to the order of Federal Reserve Bank of Philadelphia, Prior Endorsements Guaranteed."[1] Clearfield Trust Co. collected the check from the United States through the Federal Reserve Bank of Philadelphia and paid the full amount thereof to J.C. Penney Co. Neither the Clearfield Trust Co. nor J.C. Penney Co. had any knowledge or suspicion of the forgery. Each acted in good faith.

[2] [Editor's new paragraph.] On or before May 10, 1936, Barner advised the timekeeper and the foreman of the W.P.A. project on which he was employed that he had not received the check in question. This information was duly communicated to other agents of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery. No notice was given the Clearfield Trust Co. or J.C. Penney Co. of the forgery until January 12, 1937, at which time the Clearfield Trust Co. was notified. The first notice received by Clearfield Trust Co. that the United States was asking reimbursement was on August 31, 1937.

[3] This suit was instituted in 1939 by the United States against the Clearfield Trust Co. . . . . The cause of action was based on the express guaranty of prior endorsements made by the Clearfield Trust Co. J.C. Penney Co. intervened as a defendant. The case was heard on complaint, answer and stipulation of facts. The District Court held that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Co., it was barred from recovery under the rule of *Market Street Title & Trust Co. v. Chelten T. Co.*, 145 A. 848 (Pa. 1929). It

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[1]Guarantee of all prior indorsements on presentment for payment of such a check to Federal Reserve banks or member bank depositories is required by Treasury Regulations. 31 CFR § 202.32, § 202.33.

accordingly dismissed the complaint. On appeal the Circuit Court of Appeals reversed. The case is here on a petition for a writ of certiorari . . . .

[4] We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.[1] When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.[2] In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. . . . .

[5] In our choice of the applicable federal rule we have occasionally selected state law. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[b] And while the federal law merchant developed for about a century under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

[6] *United States v. National Exchange Bank*, 214 U.S. 302 (1909), falls in that category. The Court held that the United States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a

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[1]Editor's note: In a later influential article, Judge Henry J. Friendly of the Second Circuit described this as the "first holding" of *Clearfield Trust*.

[2]Various Treasury Regulations govern the payment and endorsement of government checks and warrants and the reimbursement of the Treasurer of the United States by Federal Reserve banks and member bank depositories on payment of checks or warrants bearing a forged endorsement. See 31 CFR §§ 202.0, 202.32-202.34. Forgery of the check was an offense against the United States. 18 U.S.C. § 262.

[b]Editor's note: Judge Friendly described this as the "second holding" of *Clearfield Trust* — that the rule of federal common governing the situation at hand would be uniform one.

protracted delay on the part of the United States in giving notice of the forgery.[c] The Court followed *Leather Mfrs.' Bank v. Merchants Bank*, 128 U.S. 26 (1888), which held that the right of the drawee against one who presented a check with a forged endorsement of the payee's name accrued at the date of payment and was not dependent on notice or demand. The theory of the *National Exchange Bank* case is that the who presents a check for payment warrants that he has title to it and the right to receive payment. If he has acquired the check through a forged endorsement, the warranty is breached at the time the check is cashed.

[7] [Editor's new paragraph.] The theory of the warranty has been challenged. It has been urged that "the right to recover is a quasi contractual right, resting upon the doctrine that one who confers a benefit in misreliance upon a right or duty is entitled to restitution." Woodward, Quasi Contracts (1913) 80; *First Nat. Bank v. City Nat. Bank*, 65 N.E. 24, 94 (Mass. 1902). But whatever theory is taken, we adhere to the conclusion of the *National Exchange Bank* case that the drawee's right to recover accrues when the payment is made. There is no other barrier to the maintenance of the cause of action. The theory of the drawee's responsibility where the drawer's signature is forged (Price v. Neale, 3 Burr. 1354; United States v. Chase Nat. Bank, 252 U.S. 485 , 40 S.Ct. 361, 10 A.L.R. 1401) is inapplicable here. The drawee, whether it be the United States or another, is not chargeable with the knowledge of the signature of the payee.

[8] The *National Exchange Bank* case went no further than to hold that prompt notice of the discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. The fact that the drawee is the United States and the laches those of its employees are not material. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in *United States v. National Exchange Bank*, 270 U.S. 527, 534 (1926), "The United States does business on business terms." It is not excepted from the general rules governing the rights and duties of drawees "by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt."

[9] [Editor's new paragraph.] But the damage occasioned by the delay must be established and not left to conjecture. Cases such as *Market St. Title & Trust Co. v. Chelten Trust Co.* place the burden on the drawee of giving prompt notice of the forgery — injury to the defendant being presumed by the mere fact of delay. See *London & River Plate Bank v. Bank of Liverpool*, 1 Q.B. 7 (1896). But we do not think that he who accepts a forged signature of a payee deserves that preferred treatment. It is his neglect or error in accepting the forger's signature which occasions the loss. He should be allowed to shift that loss to the drawee only on a clear showing that the drawee's delay in notifying him of the forgery caused him damage. No

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[c]Editor's note: In other words, the United States made out the check, which the payee would then "draw" from the United States as a "drawee."

such damage has been shown by Clearfield Trust Co. who so far as appears can still recover from J.C. Penney Co. The only showing on the part of the latter is contained in the stipulation to the effect that if a check cashed for a customer is returned unpaid or for reclamation a short time after the date on which it is cashed, the employees can often locate the person who cashed it. It is further stipulated that when J.C. Penney Co. was notified of the forgery in the present case none of its employees was able to remember anything about the transaction or check in question. The inference is that the more prompt the notice the more likely the detection of the forger. But that falls short of a showing that the delay caused a manifest loss. It is but another way of saying that mere delay is enough.

Affirmed.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

Notes on Clearfield Trust

1. Is *Clearfield Trust* consistent with the Rules of Decision Act, formerly § 34 of the Judiciary Act of 1789, now codified at 28 U.S.C. § 1652? This act provides that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

2. Is *Clearfield Trust* consistent with federalism?

3. Is *Clearfield Trust* consistent with separation of powers? Can federal courts *ever* make common law, or does the formulation of policy lie exclusively with Congress?

4. What is the *status* of the holding in *Clearfield Trust*? If the same issue somehow arose in *state court*, would the holding of *Clearfield Trust* control? If so, is this form of "federal common law" the same as federal common law under *Swift*?

5. *Clearfield Trust* stands for several propositions. First, it stands for the proposition that federal common law governs the rights and duties of the United States in its proprietary relations. Is this appropriate? Why shouldn't the United States do business on the same terms as everyone else?

6. Second, *Clearfield Trust* stands for the proposition that the right of the United States to recover against a warranty on its commercial paper must be uniform across the country. Is this appropriate? Don't major corporations that do business in every state have a similar need for uniformity?

7. Finally, *Clearfield Trust* stands for the proposition that the warrantor of a check (*i.e.*, Penney's or Clearfield Trust) may only assert delayed notification of forged endorsement as a defense if the warrantor can show *actual damage* attributable to the delay. Ironically, this was the rule of federal common law under the regime of *Swift v. Tyson* (1842), but Pennsylvania had a different rule!

8. The rule adopted by the Court in *Clearfield Trust* also corresponds closely to the current rule under the Uniform Commercial Code. See UCC § 3-416(c) (emphasis added) ("Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor . . . is discharged *to the extent of any loss caused by the delay in giving notice of the claim*").

9. There are several so-called "enclaves" of federal common law: (1) cases involving the rights and duties of the United States in its proprietary relations; (2) cases in admiralty and maritime jurisdiction; (3) disputes between states; and (4) cases involving foreign relations.

10. The Court has adopted a more modest approach to the issues presented in *Clearfield Trust* in recent years. *United States v. Kimbell Foods,* 440 U.S. 715 (1979), provides a good example. The issue in this case was whether the Small Business Administration, an instrumentality of the United States, could have the benefit of a special rule of federal common law in a struggle among creditors trying to recover against the same assets. The SBA argued for a rule whereby non-federal creditors whose claims had not been reduced to a fixed judgment had to yield to federal claims. Although Kimball Foods's claim against the debtor antedated that of the SBA, it had never reduced its claim to a fixed judgment. Rejecting the SBA's argument, Justice Marshall wrote as follows:

> Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules. *United States v. Yazell*, 382 U.S. 341, 354 (1966). Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

Kimbell Foods, 440 U.S. at 728-29. This approach appears to contemplate at least a "fighting chance" for the adoption of state law, on a state-by-state basis, as the applicable rule of federal common law.

11. Even if courts should decide to adopt the rule of the state in question as federal common law on a state-by-state basis, federal courts will still have a "hold back" for aberrant state law. An example of this can be found in *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973). In this case, the United States had purchased certain contingent interests in real property in Louisiana. Under the terms of the purchase, the United States' title in these properties would ripen into a fee simple absolute if Little Lake Misere failed to extract oil, gas or minerals from the properties for a stated period of time, or failed to attempt to do so. After the United States effectuated these purchases, the state enacted a statute (Act 315 of 1940) that rendered Little Lake Misere's rights "imprescriptible," *i.e.*, incapable of being destroyed. Confronted with this statute, the Court held against Little Lake Misere. As Chief Justice Burger put the matter, however the Court chose to resolve the case, Little Lake Misere could not prevail. If the Court adopted a uniform rule of federal common law, it would certainly not adopt Act 315, which would render the United States' original purchase of a contingent interest worthless. If, by contrast, it agreed to apply the law of the state in question on a state-by-state basis, it would nevertheless reject Louisiana's rule as aberrant. The Chief Justice explained as follows:

> Since Act 315 is plainly not in accord with the federal program implemented by the 1937 and 1939 land acquisitions, state law is not a permissible choice here. . . . . Once it is clear that Act 315 has no application here, we need not choose between "borrowing" some residual state rule of interpretation or formulating an independent federal "common law" rule; neither rule is the law of Louisiana yet, either rule resolves this dispute, in the Government's favor. The contract itself is unequivocal; the District Court concluded, and it is not disputed here, that by the clear and explicit terms of the contract reservations, "[respondents'] interests in the oil, gas, sulphur and other minerals terminated . . . . no later than July 23, 1947, and August 30, 1949, unless Act 315 of 1940 has caused the reservations of the servitudes in favor of [respondents] to be imprescriptible.

[20-21] **J.I. Case Co. v. Borak**
377 U.S. 426 (1964)

MR. JUSTICE CLARK delivered the opinion of the Court.

[1] This is a civil action brought by respondent, a stockholder of petitioner J.I. Case Company, charging deprivation of the pre-emptive rights of respondent and other shareholders by reason of a merger between Case and the American Tractor Corporation. It is alleged that the merger was effected through the circulation of a false and misleading proxy statement by those proposing the merger. The complaint was in two counts, the first based on diversity and claiming a breach of the directors' fiduciary duty to the stockholders. The second count alleged a violation of § 14(a) of the Securities Exchange Act of 1934 with reference to the proxy solicitation material. The trial court held that as to this count it had no power to redress the alleged violations of the Act but was limited solely to the granting of declaratory relief thereon under § 27 of the Act. . . . . On interlocutory appeal the Court of Appeals reversed[,] holding that the District Court had the power to grant remedial relief . . . . We granted certiorari [to] consider . . . the question of whether § 27 of the Act authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of § 14(a) of the Act. . . . .

I

[2] Respondent, the owner of 2,000 shares of common stock of Case acquired prior to the merger, brought this suit based on diversity jurisdiction seeking to enjoin a proposed merger between Case and the American Tractor Corporation (ATC) on various grounds, including breach of the fiduciary duties of the Case directors, self-dealing among the management of Case and ATC and misrepresentations contained in the material circulated to obtain proxies. The injunction was denied and the merger was thereafter consummated. Subsequently successive amended complaints were filed and the case was heard on the aforesaid two-count complaint. The claims pertinent to the asserted violation of the Securities Exchange Act were predicated on diversity jurisdiction as well as on § 27 of the Act. They alleged: that petitioners, or their predecessors, solicited or permitted their names to be used in the solicitation of proxies of Case stockholders for use at a special stockholders' meeting at which the proposed merger with ATC was to be voted upon; that the proxy solicitation material so circulated was false and misleading in violation of § 14(a) of the Act and Rule 14a-9 which the Commission had promulgated thereunder; that the merger was approved at the meeting by a small margin of votes and was thereafter consummated; that the merger would not have been approved but for the false and misleading statements in the proxy solicitation material; and that Case stockholders were damaged thereby. The respondent sought judgment holding the merger void and damages for himself and all other stockholders similarly situated, as well as such further relief "as equity shall require." The District Court . . . . found that its jurisdiction was limited to declaratory relief in a private, as opposed to a government, suit alleging violation of § 14(a) of the Act. Since the

additional equitable relief and damages prayed for by the respondent would, therefore, be available only under state law, it ruled those claims subject to the [state's] security for expenses statute. After setting the amount of security at $75,000 and upon the representation of counsel that the security would not be posted, the court dismissed the complaint, save that portion of Count 2 seeking a declaration that the proxy solicitation material was false and misleading and that the proxies and, hence, the merger were void.

II

[3] It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act. Indeed, this section specifically grants the appropriate District Courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act. The petitioners make no concessions, however, emphasizing that Congress made no specific reference to a private right of action in § 14(a) . . . .

III

* * *

[4] The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73d Cong., 2d Sess. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." *Id.* "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess. These broad remedial purposes are evidenced in the language of the section which makes it "unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors.*" (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.

[5] . . . . . Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set

out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it. Indeed, on the allegations of respondent's complaint, the proxy material failed to disclose alleged unlawful market manipulation of the stock of ATC, and this unlawful manipulation would not have been apparent to the Commission until after the merger.

[6] We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. . . . . It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Section 27 grants the District Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title . . . ." . . . .

[7] [If] federal jurisdiction were limited to the granting of declaratory relief, victims of deceptive proxy statements would be obliged to go into state courts for remedial relief. And if the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated. Furthermore, the hurdles that the victim might face (such as . . . security for expenses statutes, bringing in all parties necessary for complete relief, etc.) might well prove insuperable to effective relief.

IV

* * *

[8] The other contentions of the petitioners are denied.

Affirmed.

Notes on Borak

1. How would you have resolved this case? As Justice Clark notes, the federal statute in question, the Securities Exchange Act of 1934, had authorized a federal agency, the Securities Exchange Commission, to prescribe regulations "for the protection of investors." ¶ [5]. In another section of the statute, it had authorized the SEC to pursue *public* remedies against alleged offenders. Should the explicit conferral of a public right of action preclude the implication of a private one?

2. As you can see, Justice Clark relies heavily on § 27 of the Act. This section gave federal courts:

> exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

Does this language *create* rights of action, or does it merely confer jurisdiction over rights of action created elsewhere? Does it authorize federal courts to establish a body of common law to resolve cases arising under the act? In the absence of § 27, would 28 U.S.C. § 1331 be competent to achieve the same result? As you may recall, this section provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

3. If the Congress creates a rule of primary behavior — such as a requirement to stop a red lights — but neglects to confer a private right of action, are the courts usurping Congress' role in deciding to recognize one by implication?

4. Many political scientists defend private rights of action — express or implied — as an antidote to "regulatory capture." Under this theory, administrative agencies are subject to "capture" by the very entities that they purportedly regulate. This is said to occur for a variety of reasons, most particularly: (1) because bureaucrats interact with the regulated entities more often, and more predictably, than with anybody else; and (2) because the personnel of the agency and of the regulated entity are often the same individuals, exchanging roles across a "revolving door." Private rights of action, the theory says, cut across this dynamic by authorizing individuals who have a grievance against an administrative action (or inaction) to take their case directly to court.

The theoretical response to this argument lies in the supposition that perhaps Congress *wants* centralized, expert handling of a particular area of public policy. To the extent this is true, allowing private plaintiffs and federal judges to bring and resolve private actions can upset attempts to formulate coherent, expert policy. You should give careful consideration to both of these theoretical arguments as you consider the propriety of implied private rights of action.

Cort v. Ash
422 U.S. 66 (1975)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1] There are other questions, but the principal issue presented for decision is whether a private cause of action for damages against corporate directors is to be implied in favor of a corporate stockholder under 18 U.S.C. § 610, a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for." We conclude that implication of such a federal cause of action is not suggested by the legislative context of § 610 or required to accomplish Congress' purposes in enacting the statute. We therefore have no occasion to address the questions whether § 610, properly construed, proscribes the expenditures alleged in this case, or whether the statute is unconstitutional as violative of the First Amendment or of the equal protection component of the Due Process Clause of the Fifth Amendment.

I

[2] In August and September 1972, an advertisement with the caption "I say let's keep the campaign honest. Mobilize 'truth squads'" appeared in various national publications, including Time, Newsweek, and U.S. News and World Report, and in 19 local newspapers in communities where Bethlehem Steel Corp., a Delaware corporation, has plants. Reprints of the advertisement, which consisted mainly of quotations from a speech by petitioner Stewart S. Cort, chairman of the board of directors of Bethlehem, were included with the September 11, 1972, quarterly dividend checks mailed to the stockholders of the corporation. The main text of the advertisement appealed to the electorate to "encourage responsible, honest, and truthful campaigning." It alleged that vigilance was needed because "careless rhetoric and accusations . . . are being thrown around these days — their main target being the business community." In italics, under a picture of Mr. Cort, the advertisement quoted "the following statement made by a political candidate: 'The time has come for a tax system that says to big business — you must pay your fair share.'" It then printed Mr. Cort's rejoinder to this in his speech, including his opinion that to say "large corporations [are] not carrying their fair share of the tax burden" is "baloney." The advertisement concluded with an offer to send, on request, copies of Mr. Cort's entire speech and a folder "telling how to go about activating *Truth Squads*." These publications could be obtained free from the Public Affairs Department of Bethlehem. It is stipulated that the entire costs of the advertisements and various mailings were paid from Bethlehem's general corporate funds.

[3] Respondent owns 50 shares of Bethlehem stock and was qualified to vote in the 1972 Presidential election. He filed this suit in the United States District Court for the Eastern District of Pennsylvania on September 28, 1972, on behalf of himself and, derivatively, on behalf of Bethlehem. The complaint specified two separate and distinct bases for jurisdiction and relief. Count I alleged jurisdiction under 28 U.S.C. § 1331 and sought to state a private claim for relief

under 18 U.S.C. § 610, which, as mentioned, in terms provides only for a criminal penalty. Count II invoked pendent jurisdiction for a claim under Delaware law, alleging that the corporate campaign expenditures were "*ultra vires*, unlawful and [a] willful, wanton and gross breach of [defendants'] duty owed to [Bethlehem]." Immediate injunctive relief against further corporate expenditures in connection with the 1972 Presidential election or any future campaign was sought, as well as compensatory and punitive damages in favor of the corporation.

[4] The District Court denied a preliminary injunction on October 25, 1972. While the denial was supported on three grounds, it was upheld on appeal to the Court of Appeals for the Third Circuit only on the narrow ground that irreparable harm was not shown.

[5] After the affirmance on appeal, petitioners sought an order requiring respondent to post security for expenses as required by Pennsylvania law. The court declined to order such security with regard to the federal cause of action alleged in Count I, but did order respondent to post $35,000 before proceeding with the pendent claim under Count II. Rather than post security, respondent filed an amended complaint, which dropped Count II, the separate state cause of action, from the case.

[6] The District Court then granted petitioners' motion for summary judgment without opinion. The Court of Appeals reversed. . . . . We granted certiorari [and now] reverse.

II

[7] We consider first the holding of the Court of Appeals that respondent has "a private cause of action . . . [as] a citizen [or as a stockholder] to secure injunctive relief." The 1972 Presidential election is history, and respondent as citizen or stockholder seeks injunctive relief only as to future elections. In that circumstance, a statute enacted after the decision of the Court of Appeals, the Federal Election Campaign Act Amendments of 1974 . . . requires reversal of the holding of the Court of Appeals. [Justice Brennan then described the procedures for prospective relief ordained by the statute of 1974, and explained that Ash had to pursue the remedies set forth in that statute.]

III

[8] [We] turn next to the holding of the Court of Appeals that "a private cause of action . . . by a stockholder to secure . . . derivative damage relief [is] proper to remedy violation of § 610." We hold that such relief is not available with regard to a 1972 violation under § 610 itself, but rather is available, if at all, under Delaware law governing corporations.

[9] In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied) — that is, does the statute create a federal right in favor of the

plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

[10] The dissenting judge in the Court of Appeals and petitioners here suggest that where a statute provides a penal remedy alone, it cannot be regarded as creating a right in any particular class of people. "Every criminal statute is designed to protect some individual, public, or social interest . . . . To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code."

[11] Clearly, provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201-202 (1967); see also *J.I. Case Co. v. Borak*; *Texas & Pacific R. Co. v. Rigsby*. However, in *Wyandotte*, *Borak*, and *Rigsby*, there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone. Here, there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone.

[12] We need not, however, go so far as to say that in this circumstance a bare criminal statute can *never* be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group. For the intent to protect corporate shareholders particularly was at best a subsidiary purpose of § 610, and the other relevant factors all either are not helpful or militate against implying a private cause of action.

[13] *First*, § 610 is derived from the Act of January 26, 1907, which "seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." *United States v. CIO*, 335 U.S. 106, 113 (1948). Respondent bases his derivative action on the second purpose, claiming that the intent to protect stockholders from use of their invested funds for political purposes demonstrates that the statute set up a federal right in shareholders not to have corporate funds used for this purpose.

[14] However, the legislative history of the 1907 Act . . . demonstrates that the protection of ordinary stockholders was at best a secondary concern. Rather, the primary purpose of the 1907 Act, and of the 1925 Federal Corrupt Practices Act, which re-enacted the 1907 provision with some changes as § 313 of that Act, was to assure that federal elections are "'free from the power of money,'" to eliminate "'the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions.'" *United States v.*

Auto Workers, 352 U.S. 567, 576 (1957) (quoting 65 Cong. Rec. 9507 (1924)). Thus, the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders. In contrast, in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff, or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard.

[15] *Second*, there is no indication whatever in the legislative history of § 610 which suggests a congressional intention to vest in corporate shareholders a federal right to damages for violation of § 610. True, in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling. But where, as here, it is at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, the fact that there is no suggestion at all that § 610 may give rise to a suit for damages or, indeed, to any civil cause of action, reinforces the conclusion that the expectation, if any, was that the relationship between corporations and their stockholders would continue to be entrusted entirely to state law.

[16] *Third*, while "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," *J.I. Case Co. v. Borak*, 377 U.S. at 433, in this instance the remedy sought would not aid the primary congressional goal. Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to "borrow" corporate funds for a time; the later compelled repayment might well not deter the initial violation, and would certainly not decrease the impact of the use of such funds upon an election already past.

[17] *Fourth,* and finally, for reasons already intimated, it is entirely appropriate in this instance to relegate respondent and others in his situation to whatever remedy is created by state law. In addition to the *ultra vires* action pressed here, the use of corporate funds in violation of federal law may, under the law of some States, give rise to a cause of action for breach of fiduciary duty. Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. If, for example, state law permits corporations to use corporate funds as contributions in state elections, shareholders are on notice that their funds may be so used and have no recourse under any federal statute. We are necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery.

* * *

[18] Because injunctive relief is not presently available in light of the Amendments, and because implication of a federal right of damages on behalf of a corporation under § 610 would intrude into an area traditionally committed to state law without aiding the main purpose of § 610, we reverse.

It is so ordered.

Notes on Cort v. Ash

1. How would you have resolved this case? Why? What role, if any, would *expressio unius* play in your analysis, given that Congress provided for *public* enforcement of § 610? How about *ubi ius ibi remedium* (where there is a right, there is a remedy) or *ubi iniuria ibi remedium* (where there is an injury, there is a remedy)? Should the existence of a rule of primary behavior under § 610 mandate the recognition of a private right of action under that section — express or implied — or is the allowance of a such a private right of action an exclusively legislative prerogative?

2. The First Amendment would almost certainly protect Bethlehem Steel's ads today. See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Cannon v. University of Chicago
441 U.S. 677 (1979)

MR. JUSTICE STEVENS delivered the opinion of the Court.

[1] Petitioner's complaints allege that her applications for admission to medical school were denied by the respondents because she is a woman. Accepting the truth of those allegations for the purpose of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in a federal court. We granted certiorari to review that holding.

[2] Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from participation in the respondents' medical education programs because of her sex. Second, these education programs were receiving federal financial assistance at the time of her exclusion. These facts, admitted *arguendo* by respondents' motion to dismiss the complaints, establish a violation of § 901(a) of Title IX of the Education Amendments of 1972.

[3] That section, in relevant part, provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

[4] The statute does not, however, expressly authorize a private right of action by a person injured by a violation of § 901. For that reason, and because it concluded that no private remedy should be inferred, the District Court granted the respondents' motions to dismiss.

[5] The Court of Appeals agreed that the statute did not contain an implied private remedy. Noting that § 902 of Title IX establishes a procedure for the termination of federal financial support for institutions violating § 901, the Court of Appeals concluded that Congress intended that remedy to be the exclusive means of enforcement. It recognized that the statute was patterned after Title VI of the Civil Rights Act of 1964, but rejected petitioner's argument that Title VI included an implied private cause of action.

[6] After the Court of Appeal's decision was announced, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, which authorizes an award of fees to prevailing private parties in actions to enforce Title IX. The court therefore granted a petition for rehearing to consider whether, in the light of that statute, its original interpretation of Title IX had been correct. After receiving additional briefs, the court concluded that the 1976 Act was not intended to create a remedy that did not previously exist. The court also noted that the Department of Health, Education, and Welfare had taken the position that a private cause of action under Title IX should be implied, but the court disagreed with that agency's interpretation of the Act. In sum, it adhered to its original view.

[7] The Court of Appeals quite properly devoted careful attention to this question of statutory construction. As our recent cases — particularly *Cort v. Ash* — demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent. Our review of those factors persuades us, however, that the Court of Appeals reached the wrong conclusion and that petitioner does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex. After commenting on each of the four factors, we shall explain why they are not overcome by respondents' countervailing arguments.

I

[8] *First*, the threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. That question is answered by looking to the language of the statute itself. Thus, the statutory reference to "any employee of any such common carrier" in the 1893 legislation requiring railroads to equip their cars with secure "grab irons or handholds," made "irresistible" the Court's earliest "inference of a private right of action" — in that case in favor of a railway employee who was injured when a grab iron gave way. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 40 (1916).

* * *

[9] The language in [such] statutes [as the one at issue in *Rigsby*] — which expressly identifies the class Congress intended to benefit — contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort*, and other laws enacted for the protection of the general public. There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.

[10] Unquestionably, therefore, the first of the four factors identified in *Cort* favors the implication of a private cause of action. Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted.

[11] *Second*, the *Cort* analysis requires consideration of legislative history. We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Cort*, 422 U.S. at 82. But this is not the typical case. Far from evidencing any purpose to *deny* a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy.

[12] Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.

[13] In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. Most particularly, in 1967, a distinguished panel of the Court of Appeals for the Fifth Circuit squarely decided this issue in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years. In addition, at least a dozen other federal courts reached similar conclusions in the same or related contexts during those years. It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

[14] Moreover, in 1969, in *Allen v. State Board of Elections*, 393 U.S. 544, this court had interpreted the comparable language in § 5 of the Voting Rights Act as sufficient to authorize a private remedy. Indeed, during the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies — often in cases much less clear than this. It was *after* 1972 that this Court decided *Cort v. Ash* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute. We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal context. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

[15] It is not, however, necessary to rely on these presumptions. The package of statutes [that includes Title IX] also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy. Section 718 of the Education Amendments authorizes federal courts to award attorney's fees to the prevailing parties, other than the United States, in private actions brought against public educational agencies to enforce Title VI in the context of elementary and secondary education. The language of this provision explicitly presumes the availability of private suits to enforce Title VI in [this] context. For many such suits, no express cause of action was then available; hence Congress must have assumed that one could be implied under Title VI itself. That assumption was made explicit during the debates on § 718. It was also aired during the debates on other provisions in the Education Amendments of 1972 and on Title IX itself, and is consistent with the Executive Branch's apparent understanding of Title VI at the time.

[16] Finally, the very persistence — before 1972 and since, among judges and executive officials, as well as among litigants and their counsel, and even implicit in decisions of this Court — of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption. We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.

[17] *Third*, under *Cort*, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.

[18] Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective

protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

[19] The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices. That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred. In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded. Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with — and in some cases even necessary to — the orderly enforcement of the statute.

[20] The Department of Health, Education, and Welfare, which is charged with the responsibility for administering Title IX, perceives no inconsistency between the private remedy and the public remedy. On the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes. The agency's position is unquestionably correct.

[21] *Fourth*, the final inquiry suggested by *Cort* is whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. No such problem is raised by a prohibition against invidious discrimination of any sort, including that on the basis of sex. Since the Civil War, the Federal Government and the federal courts have been the "*primary* and powerful reliances" in protecting citizens against such discrimination. Moreover, it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy.

[22] In sum, there is no need in this case to weigh the four *Cort* factors; all of them support the same result. Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.

II

[23] Respondents' principal argument against implying a cause of action under Title IX is that it is unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis. They argue that this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees.

[24] This argument is not original to this litigation. It was forcefully advanced in both 1964 and 1972 by the congressional opponents of Title VI and Title IX, and squarely rejected by the congressional majorities that passed the two statutes. In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.

* * *

III

[25] Respondents advance two other arguments that deserve brief mention. Starting from the premise that Title IX and Title VI should receive the same construction, respondents argue (1) that a comparison of Title VI with other Titles of the Civil Rights Act of 1964 demonstrates that Congress created express private remedies whenever it found them desirable; and (2) that certain excerpts from the legislative history of Title VI foreclose the implication of a private remedy.

[26] Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown v. GSA*, 425 U.S. 820, 828 (1976). But each of respondents' arguments is, in any event, unpersuasive.

[27] The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. See, *e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Rather, the Court has generally avoided this type of "excursion into extrapolation of legislative intent," *Cort v. Ash*, 422 U.S. at 83 n.14, unless there is other, more convincing, evidence that Congress meant to exclude the remedy.

[28] With one set of exceptions, the excerpts from the legislative history cited by respondents as contrary to implication of a private remedy under Title VI, were all concerned with a procedure for terminating federal funding. None of them evidences any hostility toward an implied private remedy to terminate the offending discrimination. They are consistent with the assumption expressed frequently during the debates that such a judicial remedy — either through [a] broad construction of state action under § 1983 . . . or through an implied remedy — would be available to private litigants regardless of how the fund-cutoff issue was resolved.

[29] The only excerpt relied upon by respondents that deals precisely with the question whether the victim of discrimination has a private remedy under Title VI was comment by Senator Keating. In it, he expressed disappointment at the administration's failure to include his

suggestion for an express remedy in its final proposed bill. Our analysis of the legislative history convinces us, however, that neither the administration's decision not to incorporate that suggestion expressly in its bill, nor Senator Keating's response to that decision, is indicative of a rejection of a private right of action against recipients of federal funds. Instead, the former appears to have been a compromise aimed at protecting individual rights without subjecting the Government to suits, while the latter is merely one Senator's isolated expression of a preference for an express private remedy. In short, neither is inconsistent with the implication of such a remedy. Nor is there any other indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy.

[30] When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation. Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We therefore conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.

[31] 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.

MR. CHIEF JUSTICE BURGER concurs in the judgment.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, concurring.

[32] Having joined the Court's opinion in this case, my only purpose in writing separately is to make explicit what seems to me already implicit in that opinion. I think the approach of the Court, reflected in its analysis of the problem in this case and cases such as *Cort v. Ash*, 422 U.S. 66 (1975), is quite different from the analysis in earlier cases such as *J.I. Case v. Co. v. Borak*, 377 U.S. 426 (1964). The question of the existence of a private right of action is basically one of statutory construction. And while state courts of general jurisdiction still enforcing the common law as well as statutory law may be less constrained than are federal courts enforcing laws enacted by Congress, the latter must surely look to those laws to determine whether there was an intent to create a private right of action under them.

[33] We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as *Borak*, and

numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.

[34] I fully agree with the Court's statement that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

[35] In avowedly seeking to provide an additional means to effectuate the broad purpose of § 901 of the Education Amendments of 1972 to end sex discrimination in federally funded educational programs, the Court fails to heed the concomitant legislative purpose not to create a new private remedy to implement this objective. Because in my view the legislative history and statutory scheme show that Congress intended not to provide a new private cause of action, and because under our previous decisions such intent is controlling, I dissent.

I

[36] The Court recognizes that because Title IX was explicitly patterned after Title VI of the Civil Rights Act of 1964, it is difficult to infer a private cause of action in the former but not in the latter. I have set out once before my reasons for concluding that a new private cause of action to enforce Title VI should not be implied, *University of California Regents v. Bakke*, 438 U.S. 265, 379 (1978) (separate opinion of WHITE, J.), and I find nothing in the legislative materials reviewed by the Court that convinces me to the contrary. Rather, the legislative history, like the terms of Title VI itself, makes it abundantly clear that the Act was and is a mandate to federal agencies to eliminate discrimination in federally funded programs. Although there was no intention to cut back on private remedies existing under 42 U.S.C. § 1983 to challenge discrimination occurring under color of state law, there is no basis for concluding that Congress contemplated the creation of private remedies either against private parties who previously had been subject to no constitutional or statutory obligation not to discriminate, or against federal officials or agencies involved in funding allegedly discriminatory programs.

[37] The Court argues that because funding termination, authorized by § 602, is a drastic remedy, Congress must have contemplated private suits in order directly and less intrusively to terminate the discrimination allegedly being practiced by the recipient institutions. But the Court's conclusion does not follow from its premise because funding termination was not contemplated as the only — or even the primary — agency action to end discrimination. Rather, Congress considered termination of financial assistance to be a remedy of last resort, and

expressly obligated federal agencies to take measures to terminate discrimination without resorting to termination of funding.

[38] Title VI was enacted on the proposition that it was contrary at least to the "moral sense of the Nation" to expend federal funds in a racially discriminatory manner. 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). This proposition was not new, for every President since President Franklin Roosevelt had, by Executive Order, prohibited racial discrimination in hiring in certain federally assisted programs. Further, Congress was aware that most agencies dispensing federal funds already had "authority to refuse or terminate assistance for failure to comply with a variety of requirements imposed by statute or by administrative action." 110 Cong. Rec. 6546 (1964) (Sen. Humphrey). But Congress was plainly dissatisfied with agency efforts to ensure the nondiscriminatory use of federal funds; and the predicate for Title VI was the belief that "the time [had] come . . . to declare a broad principle that is right and necessary, and to make it effective for every Federal program involving financial assistance by grant, loan or contract." *Id.* at 6544.

[39] Far from conferring new private authority to enforce the federal policy of nondiscrimination, Title VI contemplated agency action to be the principal mechanism for achieving this end. The proponents of Title VI stressed that it did not "confer sweeping new authority, of undefined scope, to Federal departments and agencies," but instead was intended to require the exercise of existing authority to end discrimination by fund recipients, and to furnish the procedure for this purpose. *Id.* Thus, § 601 states the federal policy of nondiscrimination, and § 602 mandates that the agencies achieve compliance by refusing to grant or continue assistance or by "any other means authorized by law." Under § 602, cutting off funds is forbidden unless the agency determines "that compliance cannot be secured by voluntary means." As Senator Humphrey explained:

> [Title VI] encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education, public health, social welfare, disaster relief, and other urgent programs. Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination.

[40] To be sure, Congress contemplated that there would be litigation brought to enforce Title VI. The "other means" provisions of § 602 include agency suits to enforce contractual antidiscrimination provisions and compliance with agency regulations, as well as suits brought by the Department of Justice under Title IV of the 1964 Act, where the recipient is a public entity. Congress also knew that there would be private suits to enforce § 601; but these suits were not authorized by § 601 itself but by 42 U.S.C. § 1983. Every excerpt from the legislative history cited by the Court shows full awareness that private suits could redress discrimination contrary to the Constitution and Title VI, if the discrimination were imposed by public agencies; not one statement suggests contemplation of lawsuits against recipients not acting under color of state law. Senator Humphrey was quite correct in asserting that the individual's "right to go to

court and institute suit" for violation of the Fourteenth Amendment or § 601 was not limited by the presence of alternative enforcement mechanisms in § 602. Section 1983 provides a private remedy for deprivations under color of state law of any rights "secured by the Constitution and laws," and nothing in Title VI suggests an intent to create an exception to this historic remedy for vindication of federal rights as against contrary state action. The legislative history shows, however, that Congress did not intend to add to this already existing private remedy. Particularly, Congress did not intend to create a private remedy for discrimination practiced not under color of state law but by private parties or institutions.

[41] The Court further concludes that even if it cannot be persuasively demonstrated that Title VI created a private right of action, nonetheless this remedy should be inferred in Title IX because prior to its enactment several lower courts had entertained private suits to enforce the prohibition on racial discrimination in Title VI. nce again, however, there is confusion between the existing 1983 right of action to remedy denial of federal rights under color of state law — which, as Congress recognized, would encompass suits to enforce the nondiscrimination mandate of § 601— and the creation of a new right of action against private discrimination. In the case the Court relies upon most heavily, *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir..) cert. denied, 388 U.S. 911 (1967), the plaintiff class had alleged racial discrimination in violation of both Title VI and the Fourteenth Amendment, and, accordingly, the Attorney General was allowed to intervene under Title IV of the 1964 Act. In concluding that plaintiffs could sue to enforce § 601, the Court of Appeals expressed its view that this prohibition merely repeated "the law as laid down in hundreds of decisions, independent of the statute." 370 F.2d at 852. Clearly, the defendant was in violation of "the law . . . independent of the statute" only because it was a state entity, and the court was correct in concluding that § 602 did not withdraw the already existing right to sue to enforce this prohibition. However, to the extent the court based its holding on the proposition that an individual protected by a statute always has a right to enforce that statute, it was in error; and an erroneous interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent. There is not one statement in the legislative history indicating that the Congress that enacted Title IX was aware of the *Bossier* litigation, much less that it adopted the particular theory relied on to uphold plaintiffs' standing in that case.

* * *

MR. JUSTICE POWELL, dissenting.

[42] I agree with MR. JUSTICE WHITE that even under the standards articulated in our prior decisions, it is clear that no private action should be implied here. It is evident from the legislative history reviewed in his dissenting opinion that Congress did not intend to create a private action through Title IX of the Education Amendments of 1972. It also is clear that Congress deemed the administrative enforcement mechanism it did create fully adequate to protect Title IX rights. But as mounting evidence from the courts below suggests, and the decision of the Court today demonstrates, the mode of analysis we have applied in the recent past

cannot be squared with the doctrine of the separation of powers. The time has come to reappraise our standards for the judicial implication of private causes of action.

[43] Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including Titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.

[44] The facts of this case illustrate the undesirability of this assumption by the Judicial Branch of the legislative function. Whether every disappointed applicant for admission to a college or university receiving federal funds has the right to a civil-court remedy under Title IX is likely to be a matter of interest to many of the thousands of rejected applicants. It certainly is a question of vast importance to the entire higher educational community of this country. But quite apart from the interests of the persons and institutions affected, respect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process.

[45] In recent history, the Court has tended to stray from the Art. III and separation-of-powers principle of limited jurisdiction. This, I believe, is evident from a review of the more or less haphazard line of cases that led to our decision in *Cort v. Ash*. The "four factor" analysis of that case is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.

I

[46] The implying of a private action from a federal regulatory statute has been an exceptional occurrence in the past history of this Court. A review of those few decisions where such a step has been taken reveals in almost every case special historical circumstances that explain the result, if not the Court's analysis. These decisions suggest that the doctrine of implication applied by the Court today not only represents judicial assumption of the legislative function, but also lacks a principled precedential basis.

A

[47] The origin of implied private causes of actions in the federal courts is said to date back to *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). A close look at the facts of that case and the contemporary state of the law indicates, however, that *Rigsby*'s reference to the

"inference of a private right of action," carried a far different connotation than the isolated passage quoted by the Court might suggest. The narrow question presented for decision was whether the standards of care defined by the Federal Safety Appliance Act's penal provisions applied to a tort action brought against an interstate railroad by an employee not engaged in interstate commerce at the time of his injury. The jurisdiction of the federal courts was not in dispute, the action having been removed from state court on the ground that the defendant was a federal corporation. Under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), then in force, the Court was free to create the substantive standards of liability applicable to a common-law negligence claim brought in federal court. The practice of judicial reference to legislatively determined standards of care was a common expedient to establish the existence of negligence. *Rigsby* did nothing more than follow this practice, and cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress.

[Justice Powell proceeded to argue that decisions after *Rigsby* recognizing implied private rights of action were few and far between, and also driven by unique historical context.]

[48] A break in this pattern occurred in *Borak*. There the Court held that a private party could maintain a cause of action under § 14(a) of the Securities Exchange Act of 1934, in spite of Congress' express creation of an administrative mechanism for enforcing that statute. I find this decision both unprecedented and incomprehensible as a matter of public policy. The decision's rationale, which lies ultimately in the judgment that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," 377 U.S. at 42, ignores the fact that Congress, in determining the degree of regulation to be imposed on companies covered by the . . . Act, already had decided that private enforcement was unnecessary. More significant for present purposes, however, is the fact that *Borak* rather than signaling the start of a trend in this Court, constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute.

[49] Since *Borak*, this Court has upheld the implication of private causes of actions derived from federal statutes in only three extremely limited sets of circumstances[, which Justice Powell then discussed].

* * *

[50] These few cases applying *Borak* must be contrasted with the subsequent decisions where the Court refused to imply private actions. [Justice Powell then discussed these cases.]

B

[51] It was against this background of almost invariable refusal to imply private actions, absent a complete failure of alternative enforcement mechanisms and a clear expression of legislative intent to create such a remedy, that *Cort v. Ash* was decided. In holding that no private action could be brought to enforce 18 U.S.C. § 610, a criminal statute, the Court referred to four factors said to be relevant to determining generally whether private actions could be

implied. As MR. JUSTICE WHITE suggests, these factors were meant only as guideposts for answering a single question, namely, whether Congress intended to provide a private cause of action. The conclusion in that particular case was obvious. But, as the opinion of the Court today demonstrates, the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement.

[52] Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking. Asking whether a statute creates a right in favor of a private party, for example, begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right. Determining whether a private action would be consistent with the "underlying purposes" of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced. Finally, looking to state law for parallels to the federal right simply focuses inquiry on a particular policy consideration that Congress already may have weighed in deciding not to create a private action.

[53] That the *Cort* analysis too readily permits courts to override the decision of Congress not to create a private action is demonstrated conclusively by the flood of lower-court decisions applying it. Although from the time *Cort* was decided until today this Court consistently has turned back attempts to create private actions, other federal courts have tended to proceed in exactly the opposite direction. In the four years since we decided *Cort*, no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes. It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action. Indeed, the accelerating trend evidenced by these decisions attests to the need to re-examine the *Cort* analysis.

II

[54] In my view, the implication doctrine articulated in *Cort* and applied by the Court today engenders incomparably greater problems than the possibility of occasionally failing to divine an unexpressed congressional intent. If only a matter of statutory construction were involved, our obligation might be to develop more refined criteria which more accurately reflect congressional intent. "But the unconstitutionality of the course pursued has now been made clear" and compels us to abandon the implication doctrine of *Cort*. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

[55] As the above-cited 20 decisions of the Courts of Appeals illustrate, *Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch. It also invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public

scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned. Because the courts are free to reach a result different from that which the normal play of political forces would have produced, the intended beneficiaries of the legislation are unable to ensure the full measure of protection their needs may warrant. For the same reason, those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation. Moreover, the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process.

[56] The Court's implication doctrine encourages, as a corollary to the political default by Congress, an increase in the governmental power exercised by the federal judiciary. The dangers posed by judicial arrogation of the right to resolve general societal conflicts have been manifest to this Court throughout its history. . . . .

[57] It is true that the federal judiciary necessarily exercises substantial powers to construe legislation, including, when appropriate, the power to prescribe substantive standards of conduct that supplement federal legislation. But this power normally is exercised with respect to disputes over which a court already has jurisdiction, and in which the existence of the asserted cause of action is established. Implication of a private cause of action, in contrast, involves a significant additional step. By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.[17] This runs contrary to the established principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation[,]" and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction. *Lockerty v. Phillips*, 319 U.S. 182 (1943), [and other cases].

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[17]Because a private action implied from a federal statute has as an element the violation of that statute, the action universally has been considered to present a federal question over which a federal court has jurisdiction under 28 U.S.C. § 1331. Thus, when a federal court implies a private action from a statute, it necessarily expands the scope of its federal-question jurisdiction.

It is instructive to compare decisions implying private causes of action to those cases that have found nonfederal causes of action cognizable by a federal court under § 1331. *E.g.*, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Where a court decides both that federal-law elements are present in a state-law cause of action, and that these elements predominate to the point that the action can be said to present a "federal question" cognizable in federal court, the net effect is the same as implication of a private action directly from the constitutional or statutory source of the federal-law elements. To the extent an expansive interpretation of § 1331 permits federal courts to assume control over disputes which Congress did not consign to the federal judicial process, it is subject to the same criticisms of judicial implication of private actions discussed in the text.

[58] The facts of this case illustrate how the implication of a right of action not authorized by Congress denigrates the democratic process. Title IX embodies a national commitment to the elimination of discrimination based on sex, a goal the importance of which has been recognized repeatedly by our decisions. But because Title IX applies to most of our Nation's institutions of higher learning, it also trenches on the authority of the academic community to govern itself, an authority the free exercise of which is critical to the vitality of our society. Arming frustrated applicants with the power to challenge in court his or her rejection inevitably will have a constraining effect on admissions programs. The burden of expensive, vexatious litigation upon institutions whose resources often are severely limited may well compel an emphasis on objectively measured academic qualifications at the expense of more flexible admissions criteria that bring richness and diversity to academic life. If such a significant incursion into the arena of academic polity is to be made, it is the constitutional function of the Legislative Branch, subject as it is to the checks of the political process, to make this judgment.

* * *

III

[59] In sum, I believe the need both to restrain courts that too readily have created private causes of action, and to encourage Congress to confront its obligation to resolve crucial policy questions created by the legislation it enacts, has become compelling. Because the analysis suggested by *Cort* has proved inadequate to meet these problems, I would start afresh. Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes. Because the Court today is enlisting the federal judiciary in just such an enterprise, I dissent.

Notes on Cannon

1. How would you have resolved this case? Why? In his dissent in this case, Justice Powell appears to argue that the whole of the Court's prior jurisprudence on implied private rights of action is no greater than the sum of its parts, each of which is quite small and distinguishable. Do you find this persuasive?

2. As you can see, Justice Powell launched a broad attack on implied private rights of action, arguing, among other things, that they violate separation of powers. In the years since *Cannon*, the Court has become increasingly reluctant to recognize implied private rights of action, to the point where it will essentially refuse to do so. Chief Justice Rehnquist provides a flavor of this approach in ¶ [35] of *Cannon*, where he writes as follows:

> It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

Notwithstanding this strong trend, the argument is often made that courts should be willing to recognize implied private rights of action for statutes that Congress enacted during the so-called "ebullient" era of *Borak*. The argument here is that, because the courts routinely recognized IPRA's during this period, members of Congress should be presumed to have enacted legislation on the assumption that courts would continue to do so.

A Note on 42 U.S.C. § 1983 and Private Rights of Action

42 U.S.C. § 1983, which we will discuss at length later in the course, provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1983 interacts with what we have been studying in a significant way, because it arguably provides a *private right of action* for any alleged violation of a federal *rule of primary behavior* by an officer of a state or a unit of local government. In recent years, however, the Court has restricted this approach, allowing suit under § 1983 for alleged violation of a federal rule of primary only in limited circumstances.

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005), provides an example. In this case, Abrams sued the city, arguing that its refusal to allow him to construct a large antenna on his property violated the federal Telecommunications Act of 1996. As Justice Scalia wrote for the Court:

> § 1983 does not provide an avenue for relief every time a state actor violates a federal law. As a threshold matter, the text of § 1983 permits the enforcement of "*rights*, not the broader or vaguer 'benefits' or 'interests.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Accordingly, to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.

Even after this showing, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. Our cases have explained that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. 341. See also *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19-20 (1981). "The crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

[22] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics
403 U.S. 388 (1971)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

* * *

[1] In *Bell v. Hood*, 327 U.S. 678 (1946), we reserved the question whether violation of [the Fourth Amendment's prohibition against "unreasonable searches and seizures"] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

[2] This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

[3] On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause. Petitioner claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, *inter alia,* that it failed to state a cause of action. The Court of Appeals, one judge concurring specially, affirmed on that basis. We granted certiorari [and now] reverse.

I

[4] Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In [their] view, however, the rights that petitioner asserts — primarily rights of privacy — are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision, respondents nevertheless urge that we uphold dismissal of petitioner's

complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

[5] We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. at 684.

[6] *First.* Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. . . . .

[7] *Second.* The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States v. Lee*, 106 U.S. 196, 219 (1882). Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised. The inevitable consequence of this dual limitation on state power is that the federal question becomes not

merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action.

[8] *Third.* That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. at 684.

[9] [Editor's new paragraph.] The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of "federal fiscal policy," as in *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that "the United States [was] the party plaintiff to the suit. And the United States has power at any time to create the liability." *United States v. Standard Oil Co.*, 332 U. S. 301, 316 (1947).

[10] [Editor's new paragraph.] Nor [can we] accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. *J I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). "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." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

II

[11] In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. This question was not passed upon by the Court of

Appeals, and accordingly we do not consider it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE HARLAN, concurring in the judgment.

* * *

[12] [The opinion below] reasoned, in essence, that: (1) the framers of the Fourth Amendment did not appear to contemplate a "wholly new federal cause of action founded directly on the Fourth Amendment," and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right,[a] they should do so only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'" The Government takes essentially the same position here. And two members of the Court add the contention that we lack the constitutional power to accord Bivens a remedy for damages in the absence of congressional action creating "a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment."

[13] For the reasons set forth below, I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.

[14] I turn first to the contention that the constitutional power of federal courts to accord Bivens damages for his claim depends on the passage of a statute creating a "federal cause of action." Although the point is not entirely free of ambiguity, I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made [for such relief]. . . . .

[15] Thus the interest which Bivens claims — to be free from official conduct in contravention of the Fourth Amendment — is a federally protected interest. Therefore, the question of judicial *power* to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.

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[a]This is a reference to 28 U.S.C. § 1331, which authorizes federal courts to hear cases that present federal questions. On its face, it appears merely to confer jurisdiction. Would you also construe it to authorize a cause of action for alleged constitutional violations?

II

[16] The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[17] If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently "legislative," then it must be the nature of the legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary — while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution, see *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *United States v. Standard Oil Co.*, 332 U.S. 301, 304-311 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) — is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

[18] More importantly, the presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. . . . . And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution. The reach of a federal district court's "inherent equitable powers," *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 460 (Burton, J., concurring in result), is broad indeed[;] nonetheless, the federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit.

[19] If explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought

adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law. Of course, the special historical traditions governing the federal equity system, might still bear on the comparative appropriateness of granting equitable relief as opposed to money damages. That possibility, however, relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power. To that question, I now pass.

III

[20] The major thrust of the Government's position is that, where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is "essential," or "indispensable for vindicating constitutional rights." While this "essentiality" test is most clearly articulated with respect to damages remedies, apparently the Government believes the same test explains the exercise of equitable remedial powers. It is argued that historically the Court has rarely exercised the power to accord such relief in the absence of an express congressional authorization and that "[i]f Congress had thought that federal officers should be subject to a law different than state law, it would have had no difficulty in saying so, as it did with respect to state officers . . . ." See 42 U.S.C. § 1983. Although conceding that the standard of determining whether a damage remedy should be utilized to effectuate statutory policies is one of "necessity" or "appropriateness," the Government contends that questions concerning congressional discretion to modify judicial remedies relating to constitutionally protected interests warrant a more stringent constraint on the exercise of judicial power with respect to this class of legally protected interests.

[21] These arguments for a more stringent test to govern the grant of damages in constitutional cases seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

[22] The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. *Cf. J.I. Case Co. v. Borak.* In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the

appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law — vested with the power to accord a remedy — should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

[23] And I think it is clear that Bivens advances a claim of the sort that, if proved, would be properly compensable in damages. The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of "privacy"; while the Court today properly points out that the type of harm which officials can inflict when they invade protected zones of an individual's life are different from the types of harm private citizens inflict on one another, the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.

[24] On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs.

[25] Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court [presumably owing to problems of ripeness]. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

[26] The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. There is, however, something ultimately self-defeating about this argument. For if, as the Government

contends, damages will rarely be realized by plaintiffs in these cases because of jury hostility, the limited resources of the official concerned, etc., then I am not ready to assume that there will be a significant increase in the expenditure of judicial resources on these claims. Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly *de minimis.* And I simply cannot agree with my Brother BLACK that the possibility of "frivolous" claims — if defined simply as claims with no legal merit — warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.

[27] On the other hand, if — as I believe is the case with respect, at least, to the most flagrant abuses of official power — damages to some degree will be available when the option of litigation is chosen, then the question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies. See *J.I. Case Co. v. Borak.* Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

[28] Of course, for a variety of reasons, the remedy may not often be sought. And the countervailing interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations. But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances. It goes without saying that I intimate no view on the merits of petitioner's underlying claim.

[29] For these reasons, I concur in the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

[30] I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers — and perhaps get a better result — by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task — as we do not. . . .

[31] This case has significance far beyond its facts and its holding. [The Chief Justice then discussed the Exclusionary Rule.]

* * *

[32] I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions . . . . But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person — such as petitioner claims to be — has been left without an effective remedy, and hence the Court finds it necessary now — 55 years later — to construct a remedy of its own.

* * *

MR. JUSTICE BLACK, dissenting.

[33] . . . . There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against *state* officials acting under color of state law, it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.

[34] Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints — persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are

instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

[35] We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties.

[36] All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and priorities in the use of resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U.S.C. § 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

[37] I dissent.

[The dissenting opinion of Justice Blackmun is omitted.]

Notes on Bivens

1. The Fourth Amendment provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Consider this language closely. Does it set forth a rule of primary behavior? If so, against whom does it purport to operate? Does it seek to protect a cognizable class of persons? If so, who are they?

2. Assume Bivens was a member of the class the Fourth Amendment seeks to protect. Now please consider the maxims *ubi ius* or *ubi iniuria*, which we have discussed. Did

Bivens need a direct action on the Fourth Amendment for damages to vindicate his rights or ameliorate his injuries? Were any remedies available to him other than such an action?

Could the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1918), have helped him? Was there evidence to suppress? Could he have sought injunctive relief in federal court? Would his request have been ripe? See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Was there an action at law available to him *apart from* a direct action on the Fourth Amendment? What torts did the agents (allegedly) commit? Trespass? False imprisonment? Trespass to chattel? Assault? Battery? Conversion? Could he have brought such actions? Would they have been actionable under the law of New York? If so, could the agents have asserted an affirmative defense of privilege? If in fact they violated the Fourth Amendment, would such a defense have worked?

Did the agents violate the Fourth Amendment? May police search a home without a warrant or probable cause and exigent circumstances? May they arrest someone without a warrant or probable cause and exigent circumstances? May they use any amount of force they choose?

3. Justice Brennan argues that the common law, in setting the standard for liability, might take into account *self-help* — something ordinary citizens would not customarily resort to over against an officer of the law. With this in mind, he suggests that an ordinary action in tort against officers who abuse their authority might not suffice. See ¶ [7]. Do you agree?

Justice Brennan also suggests that *consent* is likely to operate differently where someone trespasses under color of law. See ¶ [7]. Is there anything to this argument? Is "trespass under color of authority" a unique tort, requiring a unique remedy? What if New York were to recognize a distinct tort for "trespass under color of law"?

Finally, Justice Brennan also argues that the Fourth Amendment's application should be *uniform* across the country. Do you agree?

4. The Constitution does not expressly authorize actions for damages to enforce its rules of primary behavior? Should this matter? Why might the framers have neglected to authorize direct actions for violations of the Constitution's provisions? Would lawyers accustomed to the *common law* have thought this way? Would they have assumed that someone like Bivens would sue the agents at common law? If that was their assumption, should the Court not have left the matter to Congress?

5. Does 28 U.S.C. § 1331 provide authority for the cause of action the Court recognizes in *Bivens*? No member of the Court appeared to deny that federal courts could grant *injunctions* in direct actions on the Constitution. Did this concession foreordain the result in *Bivens*?

6. Consider Justice Brennan's phrase "special factors counselling hesitation in the absence of affirmative action by Congress." ¶ [9]. Does this phrase suggest that courts might *refuse* to recognize a direct action on the Constitution *even if* Congress has not acted? Would such a refusal be consistent with *ubi iniuria*?

7. Now consider Justice Brennan's statement in ¶ [10] that:

> [W]e have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effected in the view of Congress.

How would (or could) Congress act on this language? Does it require something more than a clear statement — a clear statement plus a certification? Does this language contemplate that remedies under the common law might suffice, without any action on Congress' part?

9. What's *Bivens*' status? Is it pure constitutional law, beyond congressional revision? Or is it something less exalted — a form of constitutional common law? Could Congress limit the cause of action under *Bivens*? Could it limit recovery to actual damages? Could it require people like Bivens to bring an administrative action rather than one in court? Could it enact a statute foreclosing any federal cause of action, relegating people like Bivens to actions under state law?

10. Was *Bivens* foreordained by *Borak*? Does the weakening of the rationale for *Borak* weaken the rationale for *Bivens*?

11. For a few years after *Bivens*, the Court expressed a broad willingness to recognize direct actions under the Constitution. Starting in the early 1980's, however, it became increasingly reluctant to allow such actions. The next case provides an example of this trend.

Minneci v. Pollard
565 U.S. 118 (2012)

JUSTICE BREYER delivered the opinion of the Court.

[1] The question is whether we can imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison. See generally *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 389 (1971) ("[V]iolation of [the Fourth Amendment] by a federal agent . . . gives rise to a cause of action for damages" against a Federal Government employee). Because we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions — actions that provide both significant deterrence and compensation — we cannot do so. See *Wilkie v. Robbins*, 551 U.S.

537, 550 (2007) (no *Bivens* action where "alternative, existing" processes provide adequate protection).

I

[2] Richard Lee Pollard was a prisoner at a federal facility operated by a private company, the Wackenhut Corrections Corporation. In 2002 he filed a *pro se* complaint in federal court against several Wackenhut employees, who (now) include a security officer, a food-services supervisor, and several members of the medical staff. As the Federal Magistrate Judge interpreted Pollard's complaint, he claimed that these employees had deprived him of adequate medical care, had thereby violated the Eighth Amendment's prohibition against "cruel and unusual" punishment, and had caused him injury. He sought damages.

[3] Pollard said that a year earlier he had slipped on a cart left in the doorway of the prison's butcher shop. The prison medical staff took x-rays, thought he might have fractured both elbows, brought him to an outside clinic for further orthopedic evaluation, and subsequently arranged for surgery. In particular, Pollard claimed:

(1) Despite his having told a prison guard that he could not extend his arm, the guard forced him to put on a jumpsuit (to travel to the outside clinic), causing him "the most excruciating pain";

(2) During several visits to the outside clinic, prison guards made Pollard wear arm restraints that were connected in a way that caused him continued pain;

(3) Prison medical (and other) personnel failed to follow the outside clinic's instructions to put Pollard's left elbow in a posterior splint, failed to provide necessary physical therapy, and failed to conduct necessary studies, including nerve conduction studies;

(4) At times when Pollard's arms were in casts or similarly disabled, prison officials failed to make alternative arrangements for him to receive meals, with the result that (to avoid "being humiliated" in the general food service area) Pollard had to auction off personal items to obtain funds to buy food at the commissary;

(5) Prison officials deprived him of basic hygienic care to the point where he could not bathe for two weeks;

(6) Prison medical staff provided him with insufficient medicine, to the point where he was in pain and could not sleep; and

(7) Prison officials forced him to return to work before his injuries had healed.

[4] After concluding that the Eighth Amendment did not provide for a *Bivens* action against a privately managed prison's personnel, the Magistrate Judge recommended that the District Court dismiss Pollard's complaint. The District Court did so. But on appeal the Ninth Circuit found that the Eighth Amendment provided Pollard with a *Bivens* action, and it reversed the District Court.

[5] The defendants sought certiorari. And, in light of a split among the Courts of Appeals, we granted the petition.

II

[6] Recently, in *Wilkie v. Robbins*, we rejected a claim that the Fifth Amendment impliedly authorized a *Bivens* action that would permit landowners to obtain damages from government officials who unconstitutionally interfere with their exercise of property rights. After reviewing the Court's earlier *Bivens* cases, the Court stated:

> [T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages . . . . But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

[7] These standards seek to reflect and to reconcile the Court's reasoning set forth in earlier cases. In *Bivens* itself the Court held that the Fourth Amendment implicitly authorized a court to order federal agents to pay damages to a person injured by the agents' violation of the Amendment's constitutional strictures. The Court noted that "'where federally protected rights have been invaded,' "courts can "'adjust their remedies so as to grant the necessary relief.'" 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). See also *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001) ("authority to imply a new constitutional tort" anchored within general "arising under" jurisdiction). It pointed out that the Fourth Amendment prohibited, among other things, conduct that state law might permit (such as the conduct at issue in that very case). It added that the interests protected on the one hand by state "trespass" and "invasion of privacy" laws and on the other hand by the Fourth Amendment's guarantees "may be inconsistent or even hostile." *Bivens*, 403 U.S. at 394. It stated that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395. And it found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

[8] In *Davis v. Passman*, 442 U.S. 228 (1979), the Court considered a former congressional employee's claim for damages suffered as a result of her employer's unconstitutional discrimination based on gender. The Court found a damages action implicit in the Fifth Amendment's Due Process Clause. In doing so, the Court emphasized the unavailability of "other alternative forms of judicial relief." *Id.* at 245. And the Court noted that there was "no evidence" that Congress (or the Constitution) intended to foreclose such a remedy. *Id.* at 247.

[9] In *Carlson v. Green*, 446 U.S. 14 (1980), the Court considered a claim for damages brought by the estate of a federal prisoner who (the estate said) had died as the result of government officials' "deliberat[e] indifferen[ce]" to his medical needs — indifference that violated the Eighth Amendment. *Id.* at 16, n. 1, 17. The Court implied an action for damages from the Eighth Amendment. It noted that state law offered the particular plaintiff no meaningful damages remedy. Although the estate might have brought a damages claim under the Federal Tort Claims Act, the defendant in any such lawsuit was the employer, namely the United States, not the individual officers who had committed the violation. A damages remedy against an individual officer, the Court added, would prove a more effective deterrent. And, rather than leave compensation to the "vagaries" of state tort law, a federal *Bivens* action would provide "uniform rules." 446 U.S. at 23.

[10] Since *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action. These instances include:

(1) A federal employee's claim that his federal employer dismissed him in violation of the First Amendment, *Bush v. Lucas*, 462 U.S. 367 (1983) (congressionally created federal civil service procedures provide meaningful redress);

(2) A claim by military personnel that military superiors violated various constitutional provisions, *Chappell v. Wallace*, 462 U.S. 296 (1983) (special factors related to the military counsel against implying a *Bivens* action), see also *United States v. Stanley*, 483 U.S. 669 (1987) (similar);

(3) A claim by recipients of Social Security disability benefits that benefits had been denied in violation of the Fifth Amendment, *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (elaborate administrative scheme provides meaningful alternative remedy);

(4) A former bank employee's suit against a federal banking agency, claiming that he lost his job due to agency action that violated the Fifth Amendment's Due Process Clause, *FDIC v. Meyer*, 510 U.S. 471 (1994) (no *Bivens* actions against government agencies rather than particular individuals who act unconstitutionally);

(5) A prisoner's Eighth Amendment-based suit against a private corporation that managed a federal prison, *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (to permit suit against the employer-corporation would risk skewing relevant incentives; at the same time, the ability of a prisoner to bring state tort law damages action against private individual defendants means that the prisoner does not "lack effective remedies," *id.* at 72).

[11] Although the Court, in reaching its decisions, has not always similarly emphasized the same aspects of the cases, *Wilkie* fairly summarizes the basic considerations that underlie those decisions. We consequently apply its approach here. And we conclude that Pollard cannot assert a *Bivens* claim.

[12] That is primarily because Pollard's Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an "alternative, existing process" capable of protecting the constitutional interests at stake. *Wilkie*, 551 U.S. at 550. The existence of that alternative here constitutes a "convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* Our reasoning is best understood if we set forth and explain why we reject Pollard's arguments to the contrary.

III

[13] Pollard (together with supporting *amici*) asks us to imply a *Bivens* action for four basic reasons — none of which we find convincing. First, Pollard argues that this Court has already decided in *Carlson* that a federal prisoner may bring an Eighth Amendment-based *Bivens* action against prison personnel; and we need do no more than simply apply *Carlson*'s holding here. *Carlson*, however, was a case in which a federal prisoner sought damages from personnel employed by the *government*, not personnel employed by a *private* firm. And for present purposes that fact — of employment status — makes a critical difference.

[14] For one thing, the potential existence of an adequate "alternative, existing process" differs dramatically in the two sets of cases. Prisoners ordinarily cannot bring state-law tort actions against employees of the Federal Government. See 28 U.S.C. §§ 2671, 2679(b)(1) (Westfall Act) (substituting United States as defendant in tort action against federal employee); *Osborn v. Haley*, 549 U.S. 225, 238, 241 (2007) (Westfall Act immunizes federal employee through removal and substitution of United States as defendant). But prisoners ordinarily can bring state-law tort actions against employees of a private firm.

[15] For another thing, the Court specifically rejected Justice Stevens' somewhat similar suggestion in his dissenting opinion in *Malesko*, namely that a prisoner's suit against a private prison-management firm should fall within *Carlson*'s earlier holding because such a firm, like a federal employee, is a "federal agent." In rejecting the dissent's suggestion, the Court explained that the context in *Malesko* was "fundamentally different" from the contexts at issue in earlier

cases, including *Carlson*. 534 U.S. at 70. That difference, the Court said, reflected in part the nature of the defendant, *i.e.*, a corporate employer rather than an individual employee, and in part reflected the existence of alternative "effective" state tort remedies, *id.* at 72-73. This last-mentioned factor makes it difficult to square Pollard's argument with *Malesko*'s reasoning.

[16] Second, Pollard argues that, because of the "vagaries" of state tort law, *Carlson*, 446 U.S. at 23, we should consider only whether *federal* law provides adequate alternative remedies. See *id.* at 18-19, 23 (considering adequacy of federal remedies); see also, *e.g.*, *Schweiker*, 487 U.S. at 423 (similar); *Bush*, 462 U.S. at 378 (similar). But *cf. Carlson*, 446 U.S. 24 ("[R]elevant Indiana statute would not permit survival of the [state tort] claim"). This argument flounders, however, on the fact that the Court rejected it in *Malesko*. State tort law, after all, can help to deter constitutional violations as well as to provide compensation to a violation's victim. And it is consequently unsurprising that several cases have considered the adequacy or inadequacy of state-law remedies when determining whether to imply a *Bivens* remedy. See, *e.g.*, *Bivens*, 403 U.S. at 394 (state tort law "inconsistent or even hostile" to Fourth Amendment); *Davis*, 442 U.S. at 245, n. 23 (noting no state-law remedy available); *cf. Malesko*, 534 U.S. at 70 (noting that the Court has implied *Bivens* action only where any alternative remedy against individual officers was "nonexistent" or where plaintiff "lacked *any alternative remedy*" at all).

[17] Third, Pollard argues that state tort law does not provide remedies *adequate* to protect the constitutional interests at issue here. Pollard's claim, however, is a claim for physical or related emotional harm suffered as a result of aggravated instances of the kind of conduct that state tort law typically forbids. That claim arose in California, where state tort law provides for ordinary negligence actions, for actions based upon "want of ordinary care or skill," for actions for "negligent failure to diagnose or treat," and for actions based upon the failure of one with a custodial duty to care for another to protect that other from "unreasonable risk of physical harm." See Cal. Civ. Code Ann. §§ 1714(a), 1714.8(a). California courts have specifically applied this law to jailers, including private operators of prisons.

[18] Moreover, California's tort law basically reflects general principles of tort law present, as far as we can tell, in the law of every State. See Restatement (Second) of Torts §§ 314A(4), 320. We have found specific authority indicating that state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one of the eight States where privately managed secure federal facilities are currently located.

[19] We note, as Pollard points out, that state tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages, see Cal. Civ. Code Ann. § 3333.2(b), or by forbidding recovery for emotional suffering unconnected with physical harm, or by imposing procedural obstacles, say, initially requiring the use of expert administrative panels in medical malpractice cases. But we cannot find in this fact sufficient basis to determine state law inadequate.

[20] State-law remedies and a potential *Bivens* remedy need not be perfectly congruent. See *Bush*, 462 U.S. at 388 (administrative remedies adequate even though they "do not provide complete relief"). Indeed, federal law as well as state law contains limitations. Prisoners bringing federal lawsuits, for example, ordinarily may not seek damages for mental or emotional injury unconnected with physical injury. See 42 U.S.C. § 1997e(e). And *Bivens* actions, even if more generous to plaintiffs in some respects, may be less generous in others. For example, to show an Eighth Amendment violation a prisoner must typically show that a defendant acted, not just negligently, but with "deliberate indifference." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). And a *Bivens* plaintiff, unlike a state tort law plaintiff, normally could not apply principles of *respondeat superior* and thereby obtain recovery from a defendant's potentially deep-pocketed employer. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

[21] Rather, in principle, the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations. The features of the two kinds of actions just mentioned suggest that, in practice, the answer to this question is "yes." And we have found nothing here to convince us to the contrary.

[22] Fourth, Pollard argues that there "may" be similar kinds of Eighth Amendment claims that state tort law does not cover. But Pollard does not convincingly show that there are such cases.

[23] Regardless, we concede that we cannot prove a negative or be totally certain that the features of state tort law relevant here will universally prove to be, or remain, as we have described them. Nonetheless, we are certain enough about the shape of present law as applied to the kind of case before us to leave different cases and different state laws to another day. That is to say, we can decide whether to imply a *Bivens* action in a case where an Eighth Amendment claim or state law differs significantly from those at issue here when and if such a case arises. The possibility of such a different future case does not provide sufficient grounds for reaching a different conclusion here.

[24] For these reasons, where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a *Bivens* remedy in such a case.

[25] The judgment of the Ninth Circuit is reversed.

So ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

[26] I join the opinion of the Court because I agree that a narrow interpretation of the rationale of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), would not cause the holding of that case to apply to the circumstances of this case. Even if the narrowest rationale of *Bivens* did apply here, however, I would decline to extend its holding. *Bivens* is "a relic of the heady days in which this Court assumed common-law powers to create causes of action" by constitutional implication. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (SCALIA, J., concurring); see also *Wilkie v. Robbins*, 551 U.S. 537 (2007) (THOMAS, J., concurring). We have abandoned that power in the statutory field, see *Alexander v. Sandoval*, 532 U.S. 275 (2001), and we should do the same in the constitutional field, where (presumably) an imagined "implication" cannot even be repudiated by Congress. As I have previously stated, see *Malesko*, 534 U.S. at 75, I would limit *Bivens* and its two follow-on cases (*Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980)) to the precise circumstances that they involved.

JUSTICE GINSBURG, dissenting.

[27] Were Pollard incarcerated in a federal- or state-operated facility, he would have a federal remedy for the Eighth Amendment violations he alleges. See *Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* action); *Estelle v. Gamble*, 429 U.S. 97 (1976) (42 U.S.C. § 1983 action). For the reasons stated in the dissenting opinion I joined in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (opinion of Stevens, J.), I would not deny the same character of relief to Pollard, a prisoner placed by federal contract in a privately operated prison. Pollard may have suffered "aggravated instances" of conduct state tort law forbids, but that same aggravated conduct, when it is engaged in by official actors,[*] also offends the Federal Constitution. Rather than remitting Pollard to the "vagaries" of state tort law, *Carlson*, 446 U.S. at 23, I would hold his injuries, sustained while serving a federal sentence, "compensable according to uniform rules of federal law," *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring in judgment).

[28] Indeed, there is stronger cause for providing a federal remedy in this case than there was in *Malesko*. There, the question presented was whether a *Bivens* action lies against a private corporation that manages a facility housing federal prisoners. Suing a corporate employer, the majority observed in *Malesko*, would not serve to deter individual officers from conduct transgressing constitutional limitations on their authority. Individual deterrence, the Court reminded, was the consideration central to the *Bivens* decision. Noting the availability of state tort remedies, the majority in *Malesko* declined to "exten[d] *Bivens* beyond [that decision's] core premise," *i.e.*, deterring individual officers. *Malesko*, 534 U.S. at 71-73. Pollard's case, in

[*]The Ninth Circuit ruled that petitioners acted under color of federal law, and petitioners did not seek this Court's review of that determination.

contrast, involves *Bivens*' core concern: His suit seeking damages directly from individual officers would have precisely the deterrent effect the Court found absent in *Malesko*.

[29] For the reasons stated, I would hold that relief potentially available under state tort law does not block Pollard's recourse to a federal remedy for the affront to the Constitution he suffered. Accordingly, I would affirm the Ninth Circuit's judgment.

Notes on Minneci

1. *Minneci* illustrates the Court's general reluctance to expand *Bivens*. Is it making a mistake to reject most direct actions on the Constitution? You may have noted the conceptual similarity between its reluctance to recognize implied private rights of action on federal statutes and its reluctance to recognize such actions on the Constitution. What school of jurisprudence would explain these similar trends? Do you consider yourself a member of this school?

2. The Court's general reluctance in this area was further exemplified in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017). This was an attack on various aspects of federal detention in response to the events of September 11, 2001. The Court held that, because the policy arose in a "new context," the Court would engage in a "special factors analysis," which has the general effect of precluding a *Bivens* remedy. As Justice Kennedy wrote for the majority:

> [T]he Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). This is in accord with the Court's observation that it has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001). Indeed, the Court has refused to do so for the past 30 years.

[23] **Railroad Commission of Texas v. Pullman Co.**
312 U.S. 496 (1941)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

[1] In those sections of Texas where the local passenger traffic is slight, trains carry but one sleeping car. These trains, unlike trains having two or more sleepers, are without a Pullman conductor; the sleeper is in charge of a porter, who is subject to the train conductor's control. As is well known, porters on Pullmans are colored, and conductors are white. Addressing itself to this situation, the Texas Railroad Commission, after due hearing, ordered that

> no sleeping car shall be operated on any line of railroad in the State of Texas . . . unless such cars are continuously in the charge of an employee . . . having the rank and position of Pullman conductor.

[2] Thereupon, the Pullman Company and the railroads affected brought this action in a federal district court to enjoin the Commission's order. Pullman porters were permitted to intervene as complainants, and Pullman conductors entered the litigation in support of the order. Three judges having been convened [as per statute,] the court enjoined enforcement of the order. From this decree, the case came here directly.

[3] The Pullman Company and the railroads assailed the order as unauthorized by Texas law, as well as violative of the Equal Protection, the Due Process, and the Commerce Clauses of the Constitution. The intervening porters adopted these objections, but mainly objected to the order as a discrimination against Negroes in violation of the Fourteenth Amendment.

[4] The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law.

[5] The Commission found justification for its order in a Texas statute which we quote in the margin.[1] It is common ground that, if the order is within the Commission's authority, its

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[1] Vernon's Anno. Texas Civil Statutes, Article 6445:

> Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads . . . in this State[,] and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads . . . and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads[,] and to prevent

subject matter must be included in the Commission's power to prevent "unjust discrimination . . . and to prevent any and all other abuses" in the conduct of railroads. Whether arrangements pertaining to the staffs of Pullman cars are covered by the Texas concept of "discrimination" is far from clear. What practices of the railroads may be deemed to be "abuses" subject to the Commission's correction is equally doubtful. Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation.

[6] [Editor's new paragraph.] The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast, rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court, but to the supreme court of Texas. In this situation, a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to a adjustment that will avoid the waste of a tentative decision, as well as the friction of a premature constitutional adjudication.

[7] An appeal to the chancellor . . . is an appeal to the "exercise of the sound discretion, which guides the determination of courts of equity." The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state. [This principle reflects] a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.

[8] Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's

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any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law.

assumption of authority, there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.

[9] We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion.

Reversed.

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

Notes on Pullman

1. *Pullman* presented issues of racial discrimination that the Court might have felt uncomfortable addressing (or resolving) in 1941. Justice Frankfurter refers obliquely to these issues in ¶ [1]. As you know, *Brown v. Board of Education* did not come down until 1954.

2. The decision in *Pullman* depends on the "uncertainty" of the Commission's authority, as per Article 6445. See ¶ [5] n.1. Did Art. 6445 authorize the Commission to adopt the rule at issue in this case? In construing this provision, please be mindful of *ejusdem generis*.

3. From one perspective, *Pullman* is not a surprising case. Equity is an inherently discretionary form of relief, as Justice Frankfurter notes in ¶ [7], and a judge can refuse to grant an injunction on a variety of grounds. On the other hand, at least some federal appellate courts appear to review decisions under *Pullman de novo*. Ordinarily, discretionary powers are subject to review only for abuse of discretion.

4. A variety of factors can come into play in a *Pullman* situation. These include: (1) the degree to which the state law might be described as "unclear"; (2) whether the plaintiff would be able to resolve all unclear issues of state law in a single proceeding; and (3) whether some unusual situation (such as rotting cantaloupes) supports putting the dispute on a fast track. For the cantaloupe case, see *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). You may remember *Pike* from Constitutional Law I. (It's a famous case involving the Dormant Commerce Clause.)

5. Note that a federal court does not literally *dismiss* an action under *Pullman* abstention. Instead, the federal judge retains the case on his or her docket while the parties resolve the unclear issue of state law in state court. See ¶ [9] ("We therefore remand the cause to

the district court, with directions to *retain the bill* pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion."). (You may also note that Justice Frankfurter refers to the plaintiff's initial pleading as a "bill" rather than as a "complaint." As a historical matter, actions in equity began with a bill.

6. In at least one jurisdiction (Texas), the state courts have refused to address unclear issues of state law in *Pullman* situations, on the ground that their decision would not resolve the case — *i.e.*, that their opinion would be, at least in some respects, merely advisory. In this specific situation, the federal court is authorized to dismiss the case, without prejudice, with leave to the original federal plaintiffs to resubmit their federal claim if the state court resolves the unclear issue of state law against them. See *Harris County Comm'rs Court v. Moore*, 420 U.S. 77 (1975). As the Court observed in a footnote in that case:

> Ordinarily the proper course in ordering "*Pullman* abstention" is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state-law questions in state court. The Texas Supreme Court has ruled, however, that it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim.
>
> We have adopted the unusual course of dismissing in this case solely in order to avoid the possibility that some state-law remedies might otherwise be foreclosed to appellees on their return to state court. Obviously, the dismissal must not be used as a means to defeat the appellees' federal claims if and when they return to federal court.

420 U.S. at 88 n.14.

7. A potentially effective way to resolve *Pullman*-type situations is to authorize federal courts to "certify" questions of law to state courts. Some state courts will accept and answer certified questions. See, *e.g.*, Ky. Civil Rule 76.37:

> **(1) Power to answer.**
>
> If there are involved in any proceeding before the Supreme Court of the United States, any Court of Appeals of the United States, any District Court of the United States, the highest appellate court of any other state, or the District of Columbia, questions of law of this state which may be determinative of the cause then pending before the originating court and as to which it appears to the party or the originating court that there is no controlling precedent in the decisions of the Supreme Court and the Court of Appeals of this state, the Kentucky Supreme Court may answer those questions of law when certified to it by the originating court, or after judgment in the District Court upon petition of any party to the proceeding.

8. *A spanner in the works.* In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Court held, per Justice Powell, that the Eleventh Amendment prohibited bringing an action in equity on state grounds against a state officer in federal court. As a consequence, *Pullman* today has a much narrower scope of operation, or a much different scope of operation, than it would have had in Justice Frankfurter's day. In particular, a plaintiff in the position of the Pullman Company today would have to divide its claims between state and federal actions, presenting solely federal issues to the federal judge and solely state issues to the state judge. Quite likely, however, the federal judge would "slow walk" the federal claims while the state judge addressed the state claims, roughly replicating the *Pullman* dynamic.

Please note, however, that *Pennhurst* does not apply where the defendant is an officer of *local* government, or where the defendant is in the private sector. This is because the Eleventh Amendment does not protect local government, see *Lincoln County v. Luning*, 133 U.S. 529 (1890), or private persons.

9. The next case provides important information on the mechanics of *Pullman*.

England v. Louisiana State Board of Medical Examiners
375 U.S. 411 (1964)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1] Appellants are graduates of schools of chiropractic who seek to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act. They brought this action against respondent Louisiana State Board of Medical Examiners in the Federal District Court for the Eastern District of Louisiana, seeking an injunction and a declaration that, as applied to them, the Act violated the Fourteenth Amendment. A statutory three-judge court invoked, *sua sponte*,[a] the doctrine of abstention, on the ground that "[t]he state court might effectively end this controversy by a determination that chiropractors are not governed by the statute," and entered an order "staying further proceedings in this Court until the courts of the State of Louisiana shall have been afforded an opportunity to determine the issues here presented, and retaining jurisdiction to take such steps as may be necessary for the just disposition of the litigation should anything prevent a prompt state court determination."

[2] Appellants thereupon brought proceedings in the Louisiana courts. They did not restrict those proceedings to the question whether the Medical Practice Act applied to chiropractors. They unreservedly submitted for decision, and briefed and argued, their contention that the Act, if applicable to chiropractors, violated the Fourteenth Amendment. The state proceedings terminated with a decision by the Louisiana Supreme Court declining to review an intermediate appellate court's holding both that the Medical Practice Act applied to chiropractors and that, as so applied, it did not violate the Fourteenth Amendment.

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[a]Editor's note: Note that the court invoked *Pullman sua sponte*.

[3] Appellants then returned to the District Court, where they were met with a motion by appellees to dismiss the federal action. This motion was granted on the ground that, "since the courts of Louisiana have passed on all issues raised, including the claims of deprivation under the Federal Constitution, this court, having no power to review those proceedings, must dismiss the complaint. The proper remedy was by appeal to the Supreme Court of the United States."[b] The court saw the case as illustrating "the dilemma of a litigant who has invoked the jurisdiction of a federal court to assert a claimed constitutional right and finds himself remitted to the state tribunals." The dilemma, said the court, was that, "[o]n the one hand, in view of *Government & Civic Employees Organizing Committee v. Windsor*, 353 U.S. 364 (1957), he dare not restrict his state court case to local law issues. On the other, if, as required by *Windsor*, he raises the federal questions there, well established principles will bar a relitigation of those issues in the United States District Court. . . . . Since, in the usual case, no question not already passed on by the state courts will remain, he is thereby effectively deprived of a federal forum for the adjudication of his federal claims." Appellants appealed directly to this Court under 28 U.S.C. § 1253, and we noted probable jurisdiction. We reverse and remand to the District Court for decision on the merits of appellants' Fourteenth Amendment claims.

[4] There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Nor does anything in the abstention doctrine require or support such a result. Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." *Louisiana P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29 (1959). Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959).

[5] It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review, even when

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[b]Editor's note: Under 28 U.S.C. § 1257, appeal from a state's highest court lies in the Supreme Court of the United States. The negative implication of § 1257 is that appeal from a state's highest court does *not* lie in a lower federal court. This is referred to as the "*Rooker-Feldman* Doctrine," after *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

available by appeal, rather than only by discretionary with of certiorari, is an inadequate substitute for the initial District Court determination — often by three judges, 28 U.S.C. § 2281 — to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making factfindings. How the facts are found will often dictate the decision of federal claims. "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). "There is always in litigation a margin of error, representing error in factfinding . . . ." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Thus, in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts. . . . .

* * *

[6] [In *NAACP v. Button*, 371 U.S. 415 (1963), the petitioner submitted its "entire case" to the Virginia state courts for resolution, received an adverse decision, and obtained review of that decision here. Therefore,] we had no need to determine what steps, if any, short of those taken by the petitioner there would suffice to manifest the election [to submit all federal issues to the state courts]. The instant case, where appellants did not attempt to come directly to this Court but sought to return to the District Court, requires such a determination. The line drawn should be bright and clear, so that litigants shunted from federal to state courts by application of the abstention doctrine will not be exposed not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims. It might be argued that nothing short of what was done in *Button* should suffice — that a litigant should retain the right to return to the District Court unless he not only litigates his federal claims in the state tribunals, but seeks review of the state decision in this Court. But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in *Button*, when we stated that a party elects to forgo his right to return to the District Court by a decision "to seek a complete and final adjudication of his rights in the state courts." We now explicitly hold that, if a party, freely and without reservation, submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then — whether or not he seeks direct review of the state decision in this Court — he has elected to forgo his right to return to the District Court.

[7] This rule requires clarification of our decision in *Government & Civic Employees Organizing Committee v. Windsor*, the case referred to by the District Court. The plaintiffs in *Windsor* had submitted to the state courts only the question whether the state statute they

challenged applied to them, and had not "advanced" or "presented" to those courts their contentions against the statute's constitutionality. We held that

> the bare adjudication by the Alabama Supreme Court that the [appellant] union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom of expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner.

On oral argument in the instant case, we were advised that appellants' submission of their federal claims to the state courts had been motivated primarily by a belief that *Windsor* required this. The District Court likewise thought that, under *Windsor*, a party is required to litigate his federal question in the state courts, and "dare not restrict his state court case to local law issues." Others have read *Windsor* the same way. It should not be so read. The case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed "in light of" those claims. Thus, mere compliance with *Windsor* will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts, and so elected not to return to the District Court.

[8] We recognize that, in the heat of litigation, a party may find it difficult to avoid doing more than is required by *Windsor*. This would be particularly true in the typical case, such as the instant one, where the state courts are asked to construe a state statute against the backdrop of a federal constitutional challenge. The litigant denying the statute's applicability may be led not merely to state his federal constitutional claim, but to argue it, for if he can persuade the state court that application of the statute to him would offend the Federal Constitution, he will ordinarily have persuaded it that the statute should not be construed as applicable to him. In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so; and even if such a decision is not explicit, a holding that the statute is applicable may arguably imply, in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit.

[9] Despite these uncertainties arising from application of *Windsor* — which decision, we repeat, does not require that federal claims be actually litigated in the state courts — a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the "reservation to the disposition of the entire case by the state courts" that we referred to in *Button*. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than *Windsor* required, and

fully litigated his federal claims in the state courts.[12] When the reservation has been made, however, his right to return will, in all events, be preserved.[13]

[10] On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action. The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[The separate opinions of Justice Douglas, concurring, and Justice Black, concurring in part and dissenting in part, are omitted.].

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[12]It has been suggested that state courts may "take no more pleasure than do federal courts in deciding cases piecemeal . . ." and "probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them." *Clay v. Sun Ins. Office*, 363 U.S. 207, 227 (1960) (dissenting opinion). We are confident that state courts, sharing the abstention doctrine's purpose of "furthering the harmonious relation between state and federal authority," *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941), will respect a litigant's reservation of his federal claims for decision by the federal courts. See *Spector Motor Service, Inc. v. Walsh*, 61 A.2d 89, 92 (Conn. 1948). However, evidence that a party has been compelled by the state courts to litigate his federal claims there will of course preclude a finding that he has voluntarily done so. And if the state court has declined to decide the state question because of the litigant's refusal to submit without reservation the federal question as well, the District Court will have no alternative but to vacate its order of abstention.

[13]The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the plaintiff's federal claim in the state court or opposing it with the appropriate reservation. It may well be, of course, that a refusal to litigate or a reservation by any party will deter the state court from deciding the federal question.

Burford v. Sun Oil Co.
319 U.S. 315 (1943)

JUSTICE BLACK delivered the opinion of the Court.

[1] In this proceeding brought in a federal district court, the Sun Oil Co. attacked the validity of an order of the Texas Railroad Commission granting the petitioner Burford a permit to drill four wells on a small plot of land in the East Texas oil field. Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an "appeal" from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the [court below] correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order.[1]

[2] Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest"; for ["]federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

[3] The order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." The East Texas field, in which the Burford tract is located, is one of the largest in the United States. It is approximately forty miles long and between five and nine miles wide, and over 26,000 wells have been drilled in it. Oil exists in the pores and crevices of rocks and sand and moves through these channels. A large area of this sort is called a pool or reservoir and the East Texas field is a giant pool. The chief forces causing oil to move are gas and water, and it is essential that the pressures be maintained at a level which will force the oil through wells to the surface. As the gas pressure is dissipated, it becomes necessary to put the well "on the pump" at great expense; and the sooner the gas from a field is exhausted, the more oil is irretrievably lost. Since the oil moves through the entire field, one

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[1]Editor's Note: Before judicial review of administrative agencies was regularized in such statutes as the Administrative Procedure Act of 1946, the conventional way to seek review of an administrative determination was to bring an action in equity to restrain the administrator from enforcing his or her order. This was essentially what happened in *Crowell v. Benson*, 285 U.S.222 (1932), although Congress had expressly authorized judicial review of administrative decisions under the statute at issue in *Crowell*. See *Crowell* ¶ [6].

operator can not only draw the oil from under his own surface area, but can also, if he is advantageously located, drain oil from the most distant parts of the reservoir. The practice of attempting to drain oil from under the surface holdings of others leads to offset wells and other wasteful practices; and this problem is increased by the fact that the surface rights are split up into many small tracts. There are approximately nine hundred operators in the East Texas field alone.

[4] For these and many other reasons based on geologic realities, each oil and gas field must be regulated as a unit for conservation purposes. The federal government, for the present at least, has chosen to leave the principal regulatory responsibility with the States, but does supplement state control. While there is no question of the constitutional power of the State to take appropriate action to protect the industry and protect the public interest, the state's attempts to control the flow of oil and at the same time protect the interest of the many operators have from time to time been entangled in geological-legal problems of novel nature.

[5] Texas' interests in this matter are more than that very large one of conserving gas and oil, two of our most important natural resources. It must also weigh the impact of the industry on the whole economy of the State and must consider its revenue, much of which is drawn from taxes on the industry and from mineral lands preserved for the benefit of its educational and eleemosynary institutions. To prevent "past, present, and imminent evils" in the production of natural gas, a statute was enacted "for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production." The primary task of attempting adjustment of these diverse interests is delegated to the Railroad Commission, which Texas has vested with "broad discretion" in administering the law.

[6] The Commission, in cooperation with other oil producing States, has accepted state oil production quotas and has undertaken to translate the amount to be produced for the State as a whole into a specific amount for each field and . . . well. These judgments are made with due regard for [such factors as] full [use of] supply, market demand, and protection of the individual operators, as well as protection of the public interest. As an essential aspect of [this] program, the State also regulates the spacing of wells. The legislature has disavowed a purpose of requiring that "the separately owned properties in any pool [should] be unitized under one management, control or ownership" and the Commission must thus work out the difficult spacing problem with due regard for whatever rights Texas recognizes in the separate owners to a share of the common reservoir. At the same time it must restrain waste, whether by excessive production or by the unwise dissipation of the gas and other geologic factors that cause the oil to flow.

[7] Since 1919 the Commission has attempted to solve this problem by its Rule 37. The rule provides for certain minimum spacing between wells, but also allows exceptions where necessary "to prevent waste or to prevent the confiscation of property." The prevention of confiscation is based on the premises that, insofar as these privileges are compatible with the prevention of waste and the achievement of conservation, each surface owner should be

permitted to withdraw the oil under his surface area, and that no one else can fairly be permitted to drain his oil away. Hence the Commission may protect his interest either by adjusting his amount of production upward, or by permitting him to drill additional wells. "By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."[14]

[8] Additional wells may be required to prevent waste as has been noticed, where geologic circumstances require immediate drilling: "The term 'waste,' as used in oil and gas Rule 37, undoubtedly means the ultimate loss of oil. If a substantial amount of oil will be saved by the drilling of a well that otherwise would ultimately be lost, the permit to drill such well may be justified under one of the exceptions provided in Rule 37 to prevent waste."

[9] The delusive simplicity with which these principles of exception to Rule 37 can be stated should not obscure the actual non-legal complexities involved in their application. While the surface holder may, subject to qualifications noted, be entitled under current Texas law to the oil under his land, there can be no absolute certainty as to how much oil actually is present, and since the waste and confiscation problems are as a matter of physical necessity so closely interrelated, decision of one of the questions necessarily involves recognition of the other. The sheer quantity of exception cases makes their disposition of great public importance. It is estimated that over two-thirds of the wells in the East Texas field exist as exceptions to the rule, and since each exception may provoke a conflict among the interested parties, the volume of litigation arising from the administration of the rule is considerable.

[10] [Editor's new paragraph.] The instant case arises from just such an exception. It is not peculiar that the State should be represented here by its Attorney General, for cases like this, involving "confiscation," are not mere isolated disputes between private parties. Aside from the general principles which may evolve from these proceedings, the physical facts are such that an additional permit may affect pressure on a well miles away. The standards applied by the Commission in a given case necessarily affect the entire state conservation system. Of far more importance than any other private interest is the fact that the over-all plan of regulation, as well as each of its case by case manifestations, is of vital interest to the general public which must be assured that the speculative interests of individual tract owners will be put aside when necessary to prevent the irretrievable loss of oil in other parts of the field. The Commission in applying the statutory standards of course considers the Rule 37 cases as a part of the entire conservation program with implications to the whole economy of the State.

[11] With full knowledge of the importance of the decisions of the Railroad Commission both to the State and to the oil operators, the Texas legislature has established a system of

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[14] *Brown v. Humble Oil Co.*, 83 S.W.2d 935, 944 (Tex. 1935). This principle is a limitation upon the so-called 'Rule of Capture' under which the surface owner is entitled not only to the amount of oil under his land but to all other oil which he can drain from under his neighbor's land to his own. . . . .

thorough judicial review by its own state courts. The Commission orders may be appealed to a state district court in Travis County, and are reviewed by a branch of the Court of Civil Appeals and by the State Supreme Court. While the constitutional power of the Commission to enforce Rule 37 or to make exceptions to it is seldom seriously challenged, the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of state law posed in these proceedings.

[12] In describing the relation of the Texas court to the Commission, no useful purpose will be served by attempting to label the court's position as legislative, *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908), or judicial, *Bacon v. Rutland R. Co.*, 232 U.S. 134 (1914), — suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry. The Commission is charged with principal responsibility for fact finding and for policy making and the courts expressly disclaim the administrative responsibility, but on the other hand, the orders of the Commission are tested for "reasonableness" by trial *de novo* before the court, and the court may on occasion make a careful analysis of all the facts of the case in reversing [an] order. The court has fully as much power as the Commission to determine particular cases, since after trial *de novo* it can either restrain the leaseholder from proceeding to drill, or, if the case is appropriate, can restrain the Commission from interfering with the leaseholder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them. Thus, in [one] case, the court took the responsibility of "laying down some standard to guide the Commission in the exercise of its discretion" in Rule 37 cases; and in [another case, it] explicitly suggested a revision in Rule 37.

[13] To prevent the confusion of multiple review of the same general issues, the legislature provided for concentration of all direct review of the Commission's orders in the state district courts of Travis County. The Texas courts have authoritatively declared the purpose of this restriction: "If an order of the commission, lawful on its face, can be collaterally attacked in the various courts and counties of the state on grounds such as those urged in the instant case, interminable confusion would result." To permit various state courts to pass upon the Commission's rules and orders, "would lead to intolerable confusion. If all district courts of this State had jurisdiction of such matters, different courts of equal dignity might reach different and conflicting conclusions as to the same rule. Manifestly, the jurisdictional provision under discussion was incorporated in the act for the express purpose of avoiding such confusion." Time and experience, say the Texas courts, have shown the wisdom of this rule. Concentration of judicial supervision of Railroad Commission orders permits the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field. At the present time, less than ten per cent of these cases come before the federal district court.

[14] The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from

the exercise of federal equity jurisdiction. As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts. Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review. The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a state court as to state law. In those cases, the federal court attributed a given meaning to the state statute which went to the heart of the control program. The Court of Civil Appeals disagreed, but before ultimate review could be had either in Texas or here, the legislature amended its statutes so that the cases became moot. Had the Texas Civil Appeals decision come first, it would have been unnecessary to make the changes which were made in an effort to stay within the limit thought by the Governor of Texas to have been set by the tone of the federal court's opinion. The Texas legislature later changed the law back to its original state, as clear an example of [a] waste [of] motion as can be imagined. The federal court has been called upon constantly to determine whether the Railroad Commission has acted within the scope of statutory authority, while the important constitutional issues have, as the federal court has repeatedly said, been fairly well settled from the beginning.

[15] These federal court decisions on state law have created a constant task for the Texas Governor, the Texas legislature, and the Railroad Commission. The Governor of Texas, as has been noted above, felt called upon to forge his oil program in the light of the remotest inferences of federal court opinions. In one instance he thought it necessary to declare martial law. Special sessions of the legislature have been occupied with consideration of federal court decisions. Legislation passed under the circumstances of the strain and doubt created by these decisions was necessarily unsatisfactory. The Railroad Commission has had to adjust itself to the permutations of the law as seen by the federal courts. The most recent example was in connection with the *Rowan & Nichols* case, 311 U.S. 570, 572 (1941), in which the Commission felt compelled to adopt a new proration scheme to comply with the demands of a federal court decision which was reversed when it came to this Court.

* * *

[16] These questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involve[] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary. . . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." *Pullman*, 312 U.S. at 500, 501.

[17] The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

[18] The decision of the Circuit Court of appeals is reversed and the judgment of the District Court dismissing the complaint is affirmed for the reasons here stated.

Reversed.

MR. JUSTICE DOUGLAS, concurring:

[19] I agree with the opinion of the Court and join in it. But there are observations in the dissenting opinion which impel me to add a few words. If the issues in this case were framed as the dissenting opinion frames them, I would agree that we should reach the merits and not direct a dismissal of the complaint. But the opinion of the Court as I read it does not hold or even fairly imply that "the enforcement of state rights created by state legislation and affecting state policies is limited to the state courts." Any such holding would result in a drastic inroad on diversity jurisdiction — a limitation which I agree might be desirable but which Congress, not this Court, should make. The holding in these cases, however, goes to no such length.

* * *

MR. JUSTICE MURPHY joins in this opinion.

MR. JUSTICE FRANKFURTER, dissenting:

[20] To deny a suitor access to a federal district court under the circumstances of this case is to disregard a duty enjoined by Congress and made manifest by the whole history of the jurisdiction of the United States courts based upon diversity of citizenship between parties. . . . .

[21] I believe it to be wholly accurate to say that throughout our history it has never been questioned that a right created by state law and enforceable in the state courts can also be enforced in the federal courts where the parties to the controversy are citizens of different states. The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. . . . .

[22] That is the theory of diversity jurisdiction. Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation, — these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. But I must decide this case as a judge and not as a legislative reformer.

[23] Aside from the Johnson Act of May 14, 1934, the many powerful and persistent legislative efforts to abolish or restrict diversity jurisdiction have ever since the Civil War been rejected by Congress. . . . .

* * *

MR. JUSTICE ROBERTS and MR. JUSTICE REED join in this dissent.

The CHIEF JUSTICE expresses no views as to the desirability, as a matter of legislative policy, of retaining the diversity jurisdiction. In all other respects he concurs in the opinion of MR. JUSTICE FRANKFURTER.

Notes on Burford

1. *Burford* illustrates — at least obliquely — the classic "tragedy of the commons." If many people share access to an underground pool of oil and gas (or water) — then, without some form of coordination, everyone has an incentive to extract as much oil, gas or water as possible from the pool as quickly as he or she can, to prevent others from doing the same. This is an example of the so-called "Prisoners' Dilemma," which you may have read about in a course on economics. Texas attempted to respond to this situation in the East Texas oil field by making all claims subject to regulation and adjustment by the Texas Railroad Commission.

2. At least in theory, *Burford* is supposed to have narrow application — solely to actions in equity to attack state administrative adjudications where the state is attempting to formulate policy in a physical context that requires coherence, and where, in pursuit of that coherence, the state seeks to limit judicial review of those adjudications to a single forum. Because of its attractiveness as a way to preclude federal review, however, it often has a wider scope of operation than this formulation suggests.

3. As you can see, the as Railroad Commission had a major responsibility in the 1940's to regulate the production of oil and gas in the state. In fact, it still has that responsibility. Indeed, it was the model for the OPEC — the Organization of Petroleum Exporting Countries.

4. For a recent refusal by the Sixth Circuit to allow abstention as per *Burford*, see *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554 (6th Cir. 2010).

[24] **Younger v. Harris**
401 U.S. 37 (1971)

MR. JUSTICE BLACK delivered the opinion of the Court.

[1] Appellee, John Harris, Jr., was indicted in a California state court, charged with violation of the . . . California Criminal Syndicalism Act . . . . He then filed a complaint in the Federal District Court asking that court to enjoin the appellant, Younger, the District Attorney of Los Angeles County, from prosecuting him, and alleging that the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments. Appellees Jim Dan and Diane Hirsch intervened as plaintiffs in the suit, claiming that the prosecution of Harris would inhibit them as members of the Progressive Labor Party from peacefully advocating the program of their party, which was to replace capitalism with socialism and to abolish the profit system of production in this country. Appellee Farrell Broslawsky, an instructor in history at Los Angeles Valley College, also intervened, claiming that the prosecution of Harris made him uncertain as to whether he could teach about the doctrines of Karl Marx or read from the Communist Manifesto as part of his classwork. All claimed that, unless the United States court restrained the state prosecution of Harris, each would suffer immediate and irreparable injury. A three-judge Federal District Court . . . held that it had jurisdiction and power to restrain the District Attorney from prosecuting, held that the . . . Act was void for vagueness and overbreadth in violation of the First and Fourteenth Amendments, and accordingly restrained the District Attorney from "further prosecution of the currently pending action against plaintiff Harris for alleged violation of the Act."

[2] The case is before us on appeal by the State's District Attorney Younger . . . . In his notice of appeal and his jurisdictional statement, appellant presented two questions: (1) whether the decision of this Court in *Whitney v. California*, 274 U.S. 357 (1927), holding California's law constitutional in 1927 was binding on the District Court and (2) whether the State's law is constitutional on its face. In this Court, the brief for the State of California, filed at our request, also argues that only Harris, who was indicted, has standing to challenge the State's law, and that issuance of the injunction was a violation of a longstanding judicial policy and of 28 U.S.C. § 2283 [the Anti-Injunction Act], which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[3] Without regard to the questions raised about *Whitney v. California*, since overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or the constitutionality of the state law, we have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special

circumstances. We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.

I

[4] Appellee Harris has been indicted, and was actually being prosecuted by California for a violation of its Criminal Syndicalism Act at the time this suit was filed. He thus has an acute, live controversy with the State and its prosecutor. But none of the other parties plaintiff in the District Court, Dan, Hirsch, or Broslawsky, has such a controversy. None has been indicted, arrested, or even threatened by the prosecutor. About these three, the three-judge court said:

> Plaintiffs Dan and Hirsch allege that they are members of the Progressive Labor Party, which advocates change in industrial ownership and political change, and that they feel inhibited in advocating the program of their political party through peaceful, nonviolent means, because of the presence of the Act "on the books," and because of the pending criminal prosecution against Harris. Plaintiff Broslawsky is a history instructor, and he alleges that he is uncertain as to whether his normal practice of teaching his students about the doctrines of Karl Marx and reading from the Communist Manifesto and other revolutionary works may subject him to prosecution for violation of the Act.

[5] Whatever right Harris, who is being prosecuted under the state syndicalism law, may have, Dan, Hirsch, and Broslawsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true — either on the admission of the State's district attorney or on any other evidence — then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative are not to be accepted as appropriate plaintiffs in such cases. Since Harris is actually being prosecuted under the challenged laws, however, we proceed with him as a proper party.

II

[6] Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793, an Act unconditionally provided: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." A comparison of the 1793 Act with 28 U.S.C. § 2283, its present-day successor, graphically illustrates how few and minor have been the

exceptions granted from the flat, prohibitory language of the old Act. During all this lapse of years from 1793 to 1970, the statutory exceptions to the 1793 congressional enactment have been only three: (1) "except as expressly authorized by Act of Congress"; (2) "where necessary in aid of its jurisdiction"; and (3) "to protect or effectuate its judgments." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. *See Ex parte Young*, 209 U.S. 123 (1908).

[7] The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified, but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.

[8] [Editor's new paragraph.] This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. . . . .

[9] This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. In *Fenner v. Boykin*, 271 U.S. 240 (1926), suit had been brought in the Federal District Court seeking to enjoin state prosecutions under a recently enacted state law that allegedly interfered with the free flow of interstate commerce. The Court, in a unanimous

opinion, made clear that such a suit, even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances:

> *Ex parte Young* and following cases have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.

These principles, made clear in the *Fenner* case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions.

[10] In all of these cases, the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that, in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not, by themselves, be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. . . . .

* * *

[11] This is where the law stood when the Court decided *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and held that an injunction against the enforcement of certain state criminal statutes could properly issue under the circumstances presented in that case. In *Dombrowski*, unlike many of the earlier cases denying injunctions, the complaint made substantial allegations that:

> the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.

The appellants in *Dombrowski* had offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that, despite the state

court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes. These circumstances, as viewed by the Court, sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention.

[12] [Editor's new paragraph.] Indeed[,] the Court in *Dombrowski* went on to say:

> But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.

And the Court made clear that, even under these circumstances, the District Court issuing the injunction would have continuing power to lift it at any time and remit the plaintiffs to the state courts if circumstances warranted. . . . .

[13] It is against the background of these principles that we must judge the propriety of an injunction under the circumstances of the present case. Here, a proceeding was already pending in the state court affording Harris an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against Harris is brought in bad faith, or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that Harris faces is solely "that incidental to every criminal proceeding brought lawfully and in good faith," and therefore, under the settled doctrine we have already described, he is not entitled to equitable relief "even if such statutes are unconstitutional."

[14] The District Court, however, thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions, and that, under that decision, the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found "on its face" to be vague or overly broad, in violation of the First Amendment. We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument. But, as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards.

[15] [Editor's new paragraph.] In addition, we do not regard the reasons adduced to support this position as sufficient to justify such a substantial departure from the established

doctrines regarding the availability of injunctive relief. It is undoubtedly true, as the Court stated in *Dombrowski*, that

> [a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.

But this sort of "chilling effect," as the Court called it, should not, by itself, justify federal intervention. In the first place, the chilling effect cannot be satisfactorily eliminated by federal injunctive relief. In *Dombrowski* itself, the Court stated that the injunction to be issued there could be lifted if the State obtained an "acceptable limiting construction" from the state courts. The Court then made clear that, once this was done, prosecutions could then be brought for conduct occurring before the narrowing construction was made, and proper convictions could stand so long as the defendants were not deprived of fair warning. The kind of relief granted in *Dombrowski* thus does not effectively eliminate uncertainty as to the coverage of the state statute, and leaves most citizens with virtually the same doubts as before regarding the danger that their conduct might eventually be subjected to criminal sanctions.[a]

[16] [Editor's new paragraph.] The chilling effect can, of course, be eliminated by an injunction that would prohibit any prosecution whatever for conduct occurring prior to a satisfactory rewriting of the statute. But the States would then be stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the federal courts in potentially lengthy trial and appellate proceedings. Thus, in *Dombrowski* itself, the Court carefully reaffirmed the principle that, even in the direct prosecution in the State's own courts, a valid narrowing construction can be applied to conduct occurring prior to the date when the narrowing construction was made, in the absence of fair warning problems.

* * *

[17] Beyond all this is another, more basic consideration. Procedures for testing the constitutionality of a statute "on its face" in the manner apparently contemplated by *Dombrowski*, and for then enjoining all action to enforce the statute until the State can obtain court approval

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[a]Editor's note: The mechanics Justice Black is contemplating here would be complicated. Perhaps, for example, he's contemplating a declaratory action by a state prosecutor against a potential criminal defendant in state court to clarify the scope of a statute, after which the same prosecutor might ask a federal judge to lift or modify an injunction under Fed. R. Civ. P. 60(b). Although, as Justice Black indicates, the prosecutor might then take action against behavior that occurred before the narrowing construction, query whether *all* such activity would be vulnerable to prosecution, notwithstanding the narrowing construction (which presumably convinced the federal judge to lift or modify the injunction). The comfort such an injunction might offer in the first place might not be quite as "cold" as Justice Black indicates.

for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is, in the final analysis, derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation, it has been clear that, even when suits of this kind involve a "case or controversy" sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect is rarely, if ever, an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and, above all, the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.

[18] For these reasons, fundamental not only to our federal system but also to the basic functions of the Judicial Branch of the National Government under our Constitution, we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute, "on its face," abridges First Amendment rights. There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as [*Watson v. Buck*, 313 U.S. 387 (1941)], we indicated:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute "on its face" does not, in itself, justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief. Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28

U.S.C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would, in and of itself, be controlling under the circumstances of this case.

[19] The judgment of the District Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, concurring.

[20] The questions the Court decides today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases [*i.e.*, *Younger* and its companion cases], the Court deals only with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court.

[21] In basing its decisions on policy grounds, the Court does not reach any questions concerning the independent force of the federal anti-injunction statute, 28 U.S.C. § 2283. Thus we do not decide whether the word "injunction" in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is "expressly authorized" by § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983. And since all these cases involve state criminal prosecutions, we do not deal with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently. Finally, the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions.

[22] The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, or if there has been bad faith and harassment — official lawlessness — in a statute's enforcement. In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights.

[The opinion of Justice Brennan, joined by Justices White and Marshall, concurring in the result, is omitted.]

MR. JUSTICE DOUGLAS, dissenting.

[23] The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of *Dombrowski v. Pfister*, 380 U.S. 479 (1965). There we recognized that in times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.

[24] *Dombrowski* represents an exception to the general rule that federal courts should not interfere with state criminal prosecutions. The exception does not arise merely because prosecutions are threatened to which the First Amendment will be the proffered defense. *Dombrowski* governs statutes which are a blunderbuss by themselves or when used *en masse* — those that have an "overbroad" sweep. "If the rule were otherwise, the contours of regulation would have to be hammered out case by case — and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Id.* at 487. It was in the context of overbroad state statutes that we spoke of the "chilling effect upon the exercise of First Amendment rights" caused by state prosecutions. *Id.*

* * *

Notes on Younger

1. In *Samuels v. Mackell*, 401 U.S. 66 (1971), which came down on the same day as *Younger*, the Court held that the principles of *Younger* apply to actions for declaratory relief, on the ground that the degree of intrusion would be similar, if not the same.

2. Note that the Court could have, but did not, resolve this case on the basis of the Anti-Injunction Act, 28 U.S.C. § 2283, which generally forbids federal courts from enjoining proceedings in state court. See ¶ [18] (Black, J., for the Court); ¶ [21] (Stewart, J., concurring). The Anti-Injunction Act allows federal courts to enjoin such proceedings, *inter alia*, "as expressly authorized by Act of Congress." As Justice Stewart observed in his concurrence, the Court did not reach the question whether 42 U.S.C. § 1983, the statute under which Harris was suing, constitutes an express exception to § 2283. See ¶ [21]. In a later case, *Mitchum v. Foster*, 407 U.S. 225 (1972), the Court held that § 1983 in fact created such an exception.

3. Protests over the war in Viet Nam and similar divisive issues most likely had some role in *Younger*.

[25-26] **Steffel v. Thompson**
415 U.S. 452 (1974)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1] When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), held, respectively, that, unless bad-faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels*, [to wit,] whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad-faith enforcement or other special circumstances has not been made.

[2] Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its jurisdictional implementation, 28 U.S.C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202, that [Georgia's statute for criminal trespass] was being applied in violation of petitioner's First and Fourteenth Amendment rights, and an injunction restraining respondents — the solicitor of the Civil and Criminal Court of DeKalb County, the chief of the DeKalb County Police, the owner of the North DeKalb Shopping Center, and the manager of that shopping center — from enforcing the statute so as to interfere with petitioner's constitutionally protected activities.

[3] The parties stipulated to the relevant facts: On October 8, 1970, while petitioner and other individuals were distributing handbills protesting American involvement in Vietnam on an exterior sidewalk of the North DeKalb Shopping Center, shopping center employees asked them to stop handbilling and leave. They declined to do so, and police officers were summoned. The officers told them that they would be arrested if they did not stop handbilling. The group then left to avoid arrest. Two days later petitioner and a companion returned to the shopping center and again began handbilling. The manager of the center called the police, and petitioner and his companion were once again told that failure to stop their handbilling would result in their arrests. Petitioner left to avoid arrest. His companion stayed, however, continued handbilling, and was arrested and subsequently arraigned on a charge of criminal trespass in violation of [the statute].[3] Petitioner alleged in his complaint that, although he desired to return to the shopping center to distribute handbills, he had not done so because of his concern that he, too, would be arrested for violation of [the statute]; the parties stipulated that, if petitioner returned and refused upon

[3]We were advised at oral argument that the trial of petitioner's companion, Sandra Lee Becker, has been stayed pending decision of this case.

request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the Georgia statute.[4]

[4] After hearing, the District Court denied all relief and dismissed the action, finding that "no meaningful contention can be made that the state has [acted] or will in the future act in bad faith," and therefore "the rudiments of an active controversy between the parties . . . [are] lacking." Petitioner appealed only from the denial of declaratory relief. The Court of Appeals for the Fifth Circuit, one judge concurring in the result, affirmed the District Court's judgment refusing declaratory relief. The court recognized that the holdings of *Younger* and *Samuels* were expressly limited to situations where state prosecutions were pending when the federal action commenced, but was of the view that *Younger* "made it clear beyond peradventure that irreparable injury must be measured by bad faith harassment and such test must be applied to a request for injunctive relief against *threatened* state court criminal prosecution" as well as against a pending prosecution; and, furthermore, since the opinion in *Samuels* reasoned that declaratory relief would normally disrupt the state criminal justice system in the manner of injunctive relief, it followed that "the same test of bad faith harassment is prerequisite . . . for declaratory relief in a threatened prosecution." A petition for rehearing en banc was denied, three judges dissenting.

[5] We granted certiorari and now reverse.

I

[6] At the threshold we must consider whether petitioner presents an "actual controversy," a requirement imposed by Art. III of the Constitution and the express terms of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

[7] Unlike three of the appellees in *Younger*, petitioner has alleged threats of prosecution that cannot be characterized as "imaginary or speculative." He has been twice warned to stop handbilling that he claims is constitutionally protected and has been told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been "chimerical." In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. Moreover, petitioner's challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him.

[8] Nonetheless, there remains a question as to the *continuing* existence of a live and acute controversy that must be resolved on the remand we order today. . . . . [P]etitioner's complaint indicates that his handbilling activities were directed "against the War in Vietnam and

[4] At the District Court hearing, counsel for the police officers indicated that arrests in fact would be made if warrants sworn out by shopping center personnel were facially proper.

the United States' foreign policy in Southeast Asia." Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

II

[9] We now turn to the question of whether the District Court and the Court of Appeals correctly found petitioner's request for declaratory relief inappropriate.

[10] Sensitive to principles of equity, comity, and federalism, we recognized in *Younger v. Harris* that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts "to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." In *Samuels*, the Court also found that the same principles ordinarily would be flouted by issuance of a federal declaratory judgment when a state proceeding was pending, since the intrusive effect of declaratory relief "will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid."[11] We therefore held in *Samuels* that, "in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment . . . ."

[11] Neither *Younger* nor *Samuels*, however, decided the question whether federal intervention might be permissible in the absence of a pending state prosecution. . . . .

[12] These reservations anticipated the Court's recognition that the relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate

[11]The Court noted that under 28 U.S.C. § 2202 a declaratory judgment might serve as the basis for issuance of a later injunction to give effect to the declaratory judgment, and that a declaratory judgment might have a res judicata effect on the pending state proceeding.

his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

[13] When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief. Here, the Court of Appeals held that, because injunctive relief would not be appropriate since petitioner failed to demonstrate irreparable injury — a traditional prerequisite to injunctive relief — it followed that declaratory relief was also inappropriate. Even if the Court of Appeals correctly viewed injunctive relief as inappropriate — a question we need not reach today since petitioner has abandoned his request for that remedy — the court erred in treating the requests for injunctive and declaratory relief as a single issue. "[W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate[,] . . . the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance." *Perez v. Ledesma*, 401 U.S. 82, 104 (1971) (separate opinion of BRENNAN, J.)

[14] The subject matter jurisdiction of the lower federal courts was greatly expanded in the wake of the Civil War. A pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871, empowering the lower federal courts to determine the constitutionality of actions, taken by persons under color of state law, allegedly depriving other individuals of rights guaranteed by the Constitution and federal law. Four years later, in the Judiciary Act of March 3, 1875, Congress conferred upon the lower federal courts, for but the second time in their nearly century-old history, general federal-question jurisdiction subject only to a jurisdictional-amount requirement, see 28 U.S.C. § 1331.[14] With this latter enactment, the lower federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928) (emphasis added). These two statutes, together with the Court's decision in *Ex parte Young*, 209 U.S. 123 (1908) — holding that state officials who threaten to enforce an unconstitutional state statute may be enjoined by a federal court of equity and that a federal court may, in appropriate circumstances, enjoin future state criminal prosecutions under the unconstitutional Act — have "established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. at 107 (separate opinion of BRENNAN, J.).

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[14]In the last days of the John Adams administration, general federal-question jurisdiction had been granted to the federal courts by § 11 of the Midnight Judges Act (1801). The Act was repealed only one year later by § 1 of the Act of Mar. 8, 1802.

[15] A "storm of controversy" raged in the wake of *Ex parte Young*, focusing principally on the power of a single federal judge to grant *ex parte* interlocutory injunctions against the enforcement of state statutes. This uproar was only partially quelled by Congress' passage of legislation requiring the convening of a three-judge district court before a preliminary injunction against enforcement of a state statute could issue, and providing for direct appeal to this Court from a decision granting or denying such relief. From a State's viewpoint the granting of injunctive relief — even by these courts of special dignity — "rather clumsily" crippled state enforcement of its statutes pending further review. Furthermore, plaintiffs were dissatisfied with this method of testing the constitutionality of state statutes, since it placed upon them the burden of demonstrating the traditional prerequisites to equitable relief — most importantly, irreparable injury.

[16] To dispel these difficulties, Congress in 1934 enacted the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. That Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act . . . . The highlights of that history, particularly pertinent to our inquiry today, emphasize that:

> [I]n 1934, without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continuing vitality of *Ex parte Young* with respect to federal injunctions, Congress empowered the federal courts to grant a new remedy, the declaratory judgment . . . .
>
> The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy . . . . Of particular significance[,] the Senate report makes it even clearer that the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate . . . .
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> * * *
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> Much of the hostility to federal injunctions referred to in the Senate report was hostility to their use against state officials seeking to enforce state regulatory statutes carrying criminal sanctions; this was the strong feeling that produced the Three-Judge Court Act in 1910,[a] the Johnson Act of 1934, 28 U.S.C. § 1342,[b] and

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[a]We have seen this statute before. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), was brought before a three-judge court, as was *Younger v. Harris*, 401 U.S. 37 (1971). From 1910 until 1976, such courts heard any equitable attack on a statute of state-wide application, with automatic appeal to the Supreme Court. Such courts are still available today, but in a much narrower set of circumstances. See 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or

> the Tax Injunction Act of 1937, 28 U.S.C. § 1341.[c] The Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether . . . . Moreover, the Senate report's clear implication that declaratory relief would have been appropriate in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), both cases involving federal adjudication of the constitutionality of a state statute carrying criminal penalties, and the report's quotation from *Terrace v. Thompson*, 263 U.S. 197, 214, 216 (1923), which also involved anticipatory federal adjudication of the constitutionality of a state criminal statute, make it plain that Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes.[18]

Perez v. Ledesma, 401 U.S. at 111-12, 115 (separate opinion of BRENNAN, J.).

[17] It was this history that formed the backdrop to our decision in *Zwickler v. Koota*, 389 U.S. 241 (1967), where a state criminal statute was attacked on grounds of unconstitutional

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when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

[b]The Johnson Act prohibits equitable attacks in federal court on utility rates set by state agencies and subdivisions, except in narrow circumstances.

[c]The Tax Injunction Act prohibits equitable attacks in federal court on state taxes, except in narrow circumstances.

[18]As Professor Borchard, a principal proponent and author of the Federal Declaratory Judgment Act, said in a written statement introduced at the hearings on the Act:

> It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to [forgo], in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality.

overbreadth and no state prosecution was pending against the federal plaintiff. There, we found error in a three-judge district court's considering, as a single question, the propriety of granting injunctive and declaratory relief. Although we noted that injunctive relief might well be unavailable under principles of equity jurisprudence canvassed in *Douglas v. City of Jeanette*, 319 U.S. 157 (1943), we held that "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." Only one year ago, we reaffirmed [this] holding in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). In those two cases, we declined to decide whether the District Courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitutionality, anticipating that these would be given effect by state authorities. We said:

> The Court has recognized that *different considerations* enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other.

Roe v. Wade, 410 U.S. at 166 (emphasis added).

[18] The "different considerations" entering into a decision whether to grant declaratory relief have their origins in the preceding historical summary. First, as Congress recognized in 1934, a declaratory judgment will have a less intrusive effect on the administration of state criminal laws. As was observed in *Perez v. Ledesma*, 401 U.S. at 124-26 (separate opinion of BRENNAN, J.):

> Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional *in toto* — that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad — that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. Thus, where the highest court of a State has had an opportunity to give a statute regulating expression a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may

well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction.

[Editor's new paragraph.] Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has "the force and effect of a final judgment," 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.

[19] Second, engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate. . . . . Thus, the Court of Appeals was in error when it ruled that a failure to demonstrate irreparable injury — a traditional prerequisite to injunctive relief, having no equivalent in the law of declaratory judgments — precluded the granting of declaratory relief.

[20] The only occasions where this Court has disregarded these "different considerations" and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications. See *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943) (federal policy against interfering with the enforcement of state tax laws);[20] *Samuels v.*

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[20]In *Great Lakes Co. v. Huffman*, employers sought a declaration that a state unemployment compensation scheme imposing a tax upon them was unconstitutional as applied. Although not relying on the precise terms of [what is now] 28 U.S.C. § 1341, which ousts the district courts of jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," the Court, recognizing the unique effects of anticipatory adjudication on tax administration, held that declaratory relief should be withheld when the taxpayer was provided an opportunity to maintain a refund suit after payment of the disputed tax. "In contrast, there is no statutory counterpart of 28 U.S.C. § 1341 applicable to intervention in state criminal prosecutions." *Perez v. Ledesma*, 401 U.S. 82, 128 (1971) (separate opinion of BRENNAN, J.).

Mackell, 401 U.S. 66 (1971). In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) — as they are here — we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.

III

* * *

[21] We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied. 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.

[The concurring opinion of Justice Stewart, joined by the Chief Justice, is omitted.]

MR. JUSTICE WHITE, concurring.

[22] I offer the following few words in light of JUSTICE REHNQUIST's concurrence in which he discusses the impact on a pending federal action of a later filed criminal prosecution against the federal plaintiff, whether a federal court may enjoin a state criminal prosecution under a statute the federal court has earlier declared unconstitutional at the suit of the defendant now being prosecuted, and the question whether that declaratory judgment is res judicata in such a later filed state criminal action.

[23] It should be noted, first, that his views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

[24] At this writing at least, I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded res judicata effect in any later prosecution of that very conduct. There would also, I think, be additional circumstances

in which the federal judgment should be considered as more than a mere precedent bearing on the issue before the state court.

[25] Neither can I at this stage agree that the federal court, having rendered a declaratory judgment in favor of the plaintiff, could not enjoin a later state prosecution for conduct that the federal court has declared immune. The Declaratory Judgment Act itself provides that a "declaration shall have the force and effect of a final judgment or decree," 28 U.S.C. § 2201; eminent authority anticipated that declaratory judgments would be res judicata; and there is every reason for not reducing declaratory judgments to mere advisory opinions. *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), once expressed the view that 28 U.S.C. § 2283 [the Anti-Injunction Act] forbade injunctions against relitigation in state courts of federally decided issues, but the section was then amended to overrule that case, the consequence being that "[i]t is clear that the *Toucey* rule is gone, and that to protect or effectuate its judgment a federal court may enjoin relitigation in the state court." I see no more reason here to hold that the federal plaintiff must always rely solely on his plea of res judicata in the state courts. The statute provides for "[f]urther necessary or proper relief . . . against any adverse party whose rights have been determined by such judgment," 28 U.S.C. § 2202, and it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments.

[26] Finally, I would think that a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring.

[27] I concur in the opinion of the Court. Although my reading of the legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred, rather than to palliate any controversy arising from *Ex parte Young*, 209 U.S. 123 (1908), Congress apparently was aware at the time it passed the Act that persons threatened with state criminal prosecutions might choose to forgo the offending conduct and instead seek a federal declaration of their rights. Use of the declaratory judgment procedure in the circumstances presented by this case seems consistent with that congressional expectation.

[28] If this case were the Court's first opportunity to deal with this area of law, I would be content to let the matter rest there. But, as our cases abundantly illustrate, this area of law is in constant litigation, and it is an area through which our decisions have traced a path that may accurately be described as sinuous. Attempting to accommodate the principles of the new declaratory judgment procedure with other more established principles — in particular a proper regard for the relationship between the independent state and federal judiciary systems — this Court has acted both to advance and to limit the Act. Because the opinion today may possibly be

read by resourceful counsel as commencing a new and less restrictive curve in this path of adjudication, I feel it is important to emphasize what the opinion does and does not say.

[29] To begin with, it seems appropriate to restate the obvious: the Court's decision today deals only with declaratory relief and with threatened prosecutions. The case provides no authority for the granting of any injunctive relief nor does it provide authority for the granting of any relief at all when prosecutions are pending. The Court quite properly leaves for another day whether the granting of a declaratory judgment by a federal court will have any subsequent res judicata effect or will perhaps support the issuance of a later federal injunction. But since possible resolutions of those issues would substantially undercut the principles of federalism reaffirmed in *Younger v. Harris*, 401 U.S. 37 (1971), and preserved by the decision today, I feel it appropriate to add a few remarks.

[30] First, the legislative history of the Declaratory Judgment Act and the Court's opinion in this case both recognize that the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity. There is nothing in the Act's history to suggest that Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct. Thus I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in *Samuels*. The plaintiff who continues to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal lawsuit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*.

[31] Second, I do not believe that today's decision can properly be raised to support the issuance of a federal injunction based upon a favorable declaratory judgment. The Court's description of declaratory relief as "a milder alternative to the injunction remedy," having a "less intrusive effect on the administration of state criminal laws" than an injunction, indicates to me critical distinctions which make declaratory relief appropriate where injunctive relief would not be. It would all but totally obscure these important distinctions if a successful application for declaratory relief came to be regarded, not as the conclusion of a lawsuit, but as a giant step toward obtaining an injunction against a subsequent criminal prosecution. The availability of injunctive relief must be considered with an eye toward the important policies of federalism which this Court has often recognized.

* * *

[32] A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties. If the federal plaintiff pursues the conduct for which he was previously threatened with arrest and is in fact arrested, he may not return the controversy to federal court, although he may, of course, raise the federal declaratory judgment in the state court

for whatever value it may prove to have.[3] In any event, the defendant at that point is able to present his case for full consideration by a state court charged, as are the federal courts, to preserve the defendant's constitutional rights. Federal interference with this process would involve precisely the same concerns discussed in *Younger* and recited in the Court's opinion in this case.

[33] Third, attempts to circumvent *Younger* by claiming that enforcement of a statute declared unconstitutional by a federal court is *per se* evidence of bad faith should not find support in the Court's decision in this case. As the Court notes, quoting my Brother BRENNAN's separate opinion in *Perez v. Ledesma*, 401 U.S. at 125:

> The persuasive force of the [federal] court's opinion and judgment *may* lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction *may* be changed, or the legislature *may* repeal the statute and start anew."

(Emphasis added.)

[34] This language clearly recognizes that continued belief in the constitutionality of the statute by state prosecutorial officials would not commonly be indicative of bad faith and that such allegations, in the absence of highly unusual circumstances, would not justify a federal court's departure from the general principles of restraint discussed in *Younger*.

[35] If the declaratory judgment remains, as I think the Declaratory Judgment Act intended, a simple declaration of rights without more, it will not be used merely as a dramatic tactical maneuver on the part of any state defendant seeking extended delays. Nor will it force state officials to try cases time after time, first in the federal courts and then in the state courts. I do not believe Congress desired such unnecessary results, and I do not think that today's decision should be read to sanction them. Rather the Act, and the decision, stand for the sensible proposition that both a potential state defendant, threatened with prosecution but not charged, and the State itself, confronted by a possible violation of its criminal laws, may benefit from a procedure which provides for a declaration of rights without activation of the criminal process. If the federal court finds that the threatened prosecution would depend upon a statute it judges unconstitutional, the State may decide to forgo prosecution of similar conduct in the future, believing the judgment persuasive. Should the state prosecutors not find the decision persuasive enough to justify forbearance, the successful federal plaintiff will at least be able to bolster his

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[3]The Court's opinion notes that the possible res judicata effect of a federal declaratory judgment in a subsequent state court prosecution is a question "'not free from difficulty.'" I express no opinion on that issue here. However, I do note that the federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive.

allegations of unconstitutionality in the state trial with a decision of the federal district court in the immediate locality. The state courts may find the reasoning convincing even though the prosecutors did not. Finally, of course, the state legislature may decide, on the basis of the federal decision, that the statute would be better amended or repealed. All these possible avenues of relief would be reached voluntarily by the States and would be completely consistent with the concepts of federalism discussed above. Other more intrusive forms of relief should not be routinely available.

[36] These considerations should prove highly significant in reaching future decisions based upon the decision rendered today. For the present it is enough to say, as the Court does, that petitioner, if he successfully establishes the existence of a continuing controversy on remand, may maintain an action for a declaratory judgment in the District Court.

Notes on Steffel

1. Is a declaratory judgment really a "milder" form of relief than an injunction, as Justice Brennan posits in *Steffel*? See ¶ [16] (quoting *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (separate opinion of Brennan, J.); ¶ [18] (quoting *Perez v. Ledesma*, 401 U.S. at 126 (separate opinion of Brennan, J.). To be sure, one cannot be in contempt of a declaration, but — at least in theory — a party who obtains a declaration from a federal court under 28 U.S.C. § 2201 can go to the same court for an injunction under 28 U.S.C. § 2202, depending on the circumstances. This section provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

2. As you may have noticed from the separate opinions of Justices White and Rehnquist, there was disagreement among the concurring members of the Court as to whether a declaration could serve as *res judicata* in subsequent proceedings, or whether it could support an injunction. See ¶ [24] (White, J., concurring) (arguing that a declaration would serve as *res judicata*); ¶ [32] n.3 (Rehnquist, J., concurring) (repeating Justice Brennan's observation that this question was "not free from difficulty"); ¶ [25] (White, J., concurring) (arguing that an injunction in support of a *Steffel* declaration would be appropriate); ¶ [31] (Rehnquist, J., concurring) (disapproving an injunction in support of a *Steffel* declaration).

Hicks v. Miranda
422 U.S. 332 (1975)

MR. JUSTICE WHITE delivered the opinion of the Court.

[1] This case poses issues under *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. Mackell*, 401 U.S. 66 (1971), and related cases . . . .

I

[2] On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange County, Cal. On November 26 an eight-count criminal misdemeanor charge was filed in the Orange County Municipal Court against two employees of the theater, each film seized being the subject matter of two counts in the complaint. Also on November 26, the Superior Court of Orange County ordered appellees to show cause why "Deep Throat" should not be declared obscene, an immediate hearing being available to appellees, who appeared that day, objected on state-law grounds to the court's jurisdiction to conduct such a proceeding, purported to "reserve" all federal questions, and refused further to participate. Thereupon, on November 27 the Superior Court held a hearing, viewed the film, took evidence, and then declared the movie to be obscene and ordered seized all copies of it that might be found at the theater. This judgment and order were not appealed by appellees.

[3] Instead, on November 29, they filed this suit in the District Court against appellants — four police officers of Buena Park and the District Attorney and Assistant District Attorney of Orange Country. The complaint recited the seizures and the proceedings in the Superior Court, stated that the action was for an injunction against the enforcement of the California obscenity statute, and prayed for judgment declaring the obscenity statute unconstitutional, and for an injunction ordering the return of all copies of the film, but permitting one of the films to be duplicated before its return.

[4] A temporary restraining order was requested and denied, the District Judge finding the proof of irreparable injury to be lacking and an insufficient likelihood of prevailing on the merits to warrant an injunction. He requested the convening of a three-judge court, however, to consider the constitutionality of the statute. Such a court was then designated . . . .

[5] Service of the complaint was completed on January 14, 1974, and answers and motions to dismiss, as well as a motion for summary judgment, were filed by appellants. Appellees moved for a preliminary injunction. None of the motions was granted and no hearings held, all of the issues being ordered submitted on briefs and affidavits. The Attorney General of California also appeared and urged the District Court to follow *People v. Enskat*, 109 Cal. Rptr. 433 (1973), which, after *Miller v. California*, 413 U.S. 15 (1973) (*Miller I*), had upheld the California obscenity statute.

[6] Meanwhile, on January 15, the criminal complaint pending in the Municipal Court had been amended by naming appellees as additional parties defendant and by adding four conspiracy counts, one relating to each of the seized films. . . . .

[7] On June 4, 1974, the three-judge court issued its judgment and opinion declaring the California obscenity statute to be unconstitutional for failure to satisfy the requirements of *Miller I* and ordering appellants to return to appellees all copies of "Deep Throat" which had been

seized as well as to refrain from making any additional seizures. Appellants' claim that *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), required dismissal of the case was rejected, the court holding that no criminal charges were pending in the state court against appellees and that in any event the pattern of search warrants and seizures demonstrated bad faith and harassment on the part of the authorities, all of which relieved the court from the strictures of *Younger* and its related cases.

* * *

[8] Appeals were taken to this Court from both the judgment of June 4 and [an] amended judgment of September 30 [which, *inter alia*, denied appellants' motion for rehearing]. We postponed further consideration of our jurisdiction to the consideration of the merits of the case.

* * *

III

[9] The District Court committed error in reaching the merits of this case despite the appellants' insistence that it be dismissed under *Younger v. Harris* and *Samuels v. Mackell*. When they filed their federal complaint, no state criminal proceedings were pending against appellees by name; but two employees of the theater had been charged and four copies of "Deep Throat" belonging to appellees had been seized, were being held, and had been declared to be obscene and seizable by the Superior Court. Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obviously, their interests and those of their employees were intertwined; and . . . the federal action sought to interfere with the pending state prosecution. Absent a clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed. The rule in *Younger v. Harris* is designed to "permit state courts to try state cases free from interference by federal courts," particularly where the party to the federal case may fully litigate his claim before the state court. Plainly, "[t]he same comity considerations apply," where the interference is sought by some, such as appellees, not parties to the state case.

[10] What is more, on the day following the completion of service of the complaint, appellees were charged along with their employees in Municipal Court. Neither *Steffel v. Thompson*, 415 U.S. 452 (1974), nor any other case in this Court has held that[,] for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed. Indeed, the issue has been left open; and we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of

Younger v. Harris should apply in full force. Here, appellees were charged on January 15, prior to [appellants] answering the federal case and prior to any proceedings whatsoever before the three-judge court. Unless we are to trivialize the principles of *Younger v. Harris*, the federal complaint should have been dismissed on the appellants' motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of *Younger v. Harris* and related cases.

[11] The District Court concluded that extraordinary circumstances had been shown in the form of official harassment and bad faith, but this was also error. The relevant findings of the District Court were vague and conclusory. There were references to the "pattern of seizure" and to "the evidence brought to light by the petition for rehearing"; and the unexplicated conclusion was then drawn that "regardless of the nature of any judicial proceeding," the police were bent on banishing "Deep Throat" from Buena Park. Yet each step in the pattern of seizures condemned by the District Court was authorized by judicial warrant or order; and the District Court did not purport to invalidate any of the four warrants, in any way to question the propriety of the proceedings in the Superior Court, or even to mention the reversal of the suppression order in the Appellate Department of that court. Absent at least some effort by the District Court to impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct, we cannot agree that bad faith and harassment were made out. Indeed, such conclusion would not necessarily follow even if it were shown that the state courts were in error on some one or more issues of state or federal law.

[12] In the last analysis, it seems to us that the District Court's judgment rests almost entirely on its conclusion that the California obscenity statute was unconstitutional and unenforceable. But even assuming that the District Court was correct in its conclusion, the statute had not been so condemned in November 1973, and the District Court was not entitled to infer official bad faith merely because it — the District Court — disagreed with *People v. Enskat*. Otherwise, bad faith and harassment would be present in every case in which a state statute is ruled unconstitutional, and the rule of *Younger v. Harris* would be swallowed up by its exception. The District Court should have dismissed the complaint before it and we accordingly reverse its judgment.

So ordered.

[The opinion of Chief Justice Burger, concurring, is omitted.]

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

* * *

[13] In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Court unanimously held that the principles of equity, comity, and federalism embodied in *Younger v. Harris* and *Samuels v.*

Mackell do not preclude a federal district court from entertaining an action to declare unconstitutional a state criminal statute when a state criminal prosecution is threatened but not pending at the time the federal complaint is filed. Today the Court holds that the *Steffel* decision is inoperative if a state criminal charge is filed at any point after the commencement of the federal action "before any proceedings of substance on the merits have taken place in the federal court." Any other rule, says the Court, would "trivialize" the principles of *Younger v. Harris*. I think this ruling "trivializes" *Steffel*, decided just last Term, and is inconsistent with those same principles of equity, comity, and federalism.

[14] There is, to be sure, something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse. The rule the Court adopts today, however, does not eliminate that race; it merely permits the State to leave the mark later, run a shorter course, and arrive first at the finish line. This rule seems to me to result from a failure to evaluate the state and federal interests as of the time the state prosecution was commenced.

[15] As of the time when its jurisdiction is invoked in a *Steffel* situation, a federal court is called upon to vindicate federal constitutional rights when no other remedy is available to the federal plaintiff. The Court has recognized that at this point in the proceedings no substantial state interests counsel the federal court to stay its hand. . . . .

[16] Consequently, we concluded that "[r]equiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head." . . . .

[17] The duty of the federal courts to adjudicate and vindicate federal constitutional rights is, of course, shared with state courts, but there can be no doubt that the federal courts are "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis. The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1927). The statute under which this action was brought, 42 U.S.C. § 1983, established in our law "the role of the Federal Government as a guarantor of basic federal rights against state power." Indeed, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people." And this central interest of a federal court as guarantor of constitutional rights is fully implicated from the moment its jurisdiction is invoked. How, then, does the subsequent filing of a state criminal charge change the situation from one in which the federal court's dismissal of the action under *Younger* principles "would turn federalism on its head" to one in which *failure* to dismiss would "trivialize" those same principles?

[18] A State has a vital interest in the enforcement of its criminal law, and this Court has said time and again that it will sanction little federal interference with that important state function. But there is nothing in our decision in *Steffel* that requires a State to stay its hand during the pendency of the federal litigation. If, in the interest of efficiency, the State wishes to

refrain from actively prosecuting the criminal charge pending the outcome of the federal declaratory judgment suit, it may, of course, do so. But no decision of this Court requires it to make that choice.

[19] The Court today, however, goes much further than simply recognizing the right of the State to proceed with the orderly administration of its criminal law; it ousts the federal courts from their historic role as the "primary reliances" for vindicating constitutional freedoms. This is no less offensive to "Our Federalism" than the federal injunction restraining pending state criminal proceedings condemned in *Younger v. Harris*. The concept of federalism requires "sensitivity to the legitimate interests of *both* State and National Governments." *Younger v. Harris* and its companion cases reflect the principles that the federal judiciary must refrain from interfering with the legitimate functioning of state courts. But surely the converse is a principle no less valid.

[20] The Court's new rule creates a reality which few state prosecutors can be expected to ignore. It is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction. One need not impugn the motives of state officials to suppose that they would rather prosecute a criminal suit in state court than defend a civil case in a federal forum. Today's opinion virtually instructs state officials to answer federal complaints with state indictments. Today, the State must file a criminal charge to secure dismissal of the federal litigation; perhaps tomorrow an action "akin to a criminal proceeding" will serve the purpose, and the day may not be far off when any state civil action will do.

[21] The doctrine of *Younger v. Harris* reflects an accommodation of competing interests. The rule announced today distorts that balance beyond recognition.

Notes on Hicks v. Miranda

Do you understand the rule of this case? As you may have observed, at the precise moment that Miranda and the other appellees brought their federal action for declaratory relief against Hicks *et al.*, there was no criminal prosecution pending against *them* in state court. To be sure, there was a prosecution pending against *their employees* — two projectionists, most likely — but they themselves were not defendants in a criminal case. See ¶¶ [2]-[3]. Therefore, one could plausibly assert that *Steffel*, not *Samuels v. Mackell*, would control, and the federal declaratory action could proceed. But the Court, per Justice White, held otherwise. He reached this conclusion on two distinct grounds. First, as a narrow matter, he saw a sufficient connection between Miranda *et al.* and the employees that they could not legally disentangle themselves. See ¶ [9]. Second, and more broadly, the action in federal court had not progressed beyond an embryonic stage. See ¶ [10]. As Justice White emphasized, "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but *before any proceedings of substance on the merits have taken place in the federal court*, the principles of *Younger v. Harris* should apply in full force."). ¶ [10] (emphasis added).

Doran v. Salem Inn, Inc.
422 U.S. 922 (1975)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

[1] Appellant is a town attorney in Nassau County, N.Y., who, along with other local law enforcement officials, was preliminary enjoined by the United States District Court for the Eastern District of New York from enforcing a local ordinance of the town of North Hempstead. In addition to defending the ordinance on the merits, he contends that the complaint should have been dismissed on the authority of *Younger v. Harris* and its companion cases.

[2] Appellees are three corporations which operate bars at various locations within the town. Prior to enactment of the ordinance in question, each provided topless dancing as entertainment for its customers. On July 17, 1973, the town enacted Local Law No. 1-1973, an ordinance making it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered or so thinly draped as to appear uncovered. Appellees complied with the ordinance by clothing their dancers in bikini tops, but on August 9, 1973, brought this action in the District Court under 42 U.S.C. § 1983. They alleged that the ordinance violated their rights under the First and Fourteenth Amendments . . . . Their pleadings sought a temporary restraining order, a preliminary injunction, and declaratory relief. The prayer for a temporary restraining order was denied *instanter*, but the motion for a preliminary injunction was set for a hearing on August 22, 1973.

[3] On August 10, the day after the appellees' complaint was filed, and their application for a temporary restraining order denied, one of them, M & L Restaurant, Inc., resumed its briefly suspended presentation of topless dancing. On that day, and each of the three succeeding days, M & L and its topless dancers were served with criminal summonses based on violation of the ordinance. These summonses were returnable before the Nassau County Court on September 13, 1973. The other two appellees, Salem Inn, Inc., and Tim-Rob Bar, Inc., did not resume the presentation of topless entertainment in their bars until after the District Court issued its preliminary injunction.

[4] On September 5, 1973, appellant filed an answer which alleged that a criminal prosecution had been instituted against at least one of the appellees; the District Court was urged to "refuse to exercise jurisdiction" and to dismiss the complaint.

[5] On September 6, 1973, on the basis of oral argument and memoranda of law, the District Court entered an opinion and order in which it "[found] that (1) Local Law No. 1-1973 of the Town of North Hempstead is on its face violative of plaintiffs' First Amendment rights in that it prohibits across the board non-obscene conduct in the form of topless dancing, and (2) that the daily penalty of $500 for each violation of the ordinance, the prior state-court decision validating a similar ordinance, the overbreadth of the ordinance, and the potential harm to plaintiffs' business by its enforcement justify federal intervention and injunctive relief." The

court concluded by enjoining appellant "pending the final determination of this action . . . from prosecuting the plaintiffs for any violation of Local Law No. 1-1973 . . . or in any way interfering with their activities which may be prohibited by the text of said Local Law." The court did address appellant's *Younger* contention, but held that the pending prosecution against M & L did not affect the availability of injunctive relief to Salem and Tim-Rob. As for M & L, it concluded that if federal relief were granted to two of the appellees, "it would be anomalous" not to extend it to M & L as well.

[6] The Court of Appeals for the Second Circuit affirmed by a divided vote. It held that the "ordinance would have to fall," and that the claim of deprivation of constitutional rights and diminution of business warranted the issuance of a preliminary injunction. The Court of Appeals rejected appellant's claim that the District Court ought to have dismissed appellees' complaint on the authority of *Younger v. Harris* and its companion cases. As to Salem and Tim-Rob, *Younger* did not present a bar because there had at no time been a pending prosecution against them under the ordinance. As for M & L, the court thought that it posed "a slightly different problem," since the state prosecution was begun only one day after the filing of appellees' complaint in the District Court. The court recognized that this situation was not squarely covered by either *Younger* or *Steffel v. Thompson*, 415 U.S. 452 (1974), but concluded that the interests of avoiding contradictory outcomes, of conservation of judicial energy, and of a clearcut method for determining when federal courts should defer to state prosecutions, all militated in favor of granting relief to all three appellees.

* * *

[7] Turning to the *Younger* issues raised by petitioner, we are faced with the necessity of determining whether the holdings of *Younger*, *Steffel* and *Samuels v. Mackell* must give way before such interests in efficient judicial administration as were relied upon by the Court of Appeals. We think that the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law. The classic example is the petitioner in *Steffel* and his companion. Both were warned that failure to cease pamphleteering would result in their arrest, but while the petitioner in *Steffel* ceased and brought an action in the federal court, his companion did not cease and was prosecuted on a charge of criminal trespass in the state court. The same may be said of the interest in conservation of judicial manpower. As worthy a value as this is in a unitary system, the very existence of one system of federal courts and 50 systems of state courts, all charged with the responsibility for interpreting the United States Constitution, suggests that on occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time, and location to justify being heard before a single judge had they arisen within a unitary system.

[8] We do not agree with the Court of Appeals, therefore, that all three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes, and should thereby each be entitled to injunctive relief. We cannot accept that view, any more than we can accept

petitioner's equally Procrustean view that because M & L would have been barred from injunctive relief had it been the sole plaintiff, Salem and Tim-Rob should likewise be barred not only from injunctive relief but from declaratory relief as well. While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case — while respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

[9] Respondent M & L could have pursued the course taken by the other respondents after the denial of their request for a temporary restraining order. Had it done so, it would not have subjected itself to prosecution for violation of the ordinance in the state court. When the criminal summonses issued against M & L on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage and no contested matter had been decided. In this posture, M & L's prayer for injunction is squarely governed by *Younger*.

[10] We likewise believe that for the same reasons *Samuels v. Mackell* bars M & L from obtaining declaratory relief, absent a showing of *Younger*'s special circumstances, even though the state prosecution was commenced the day following the filing of the federal complaint. Having violated the ordinance, rather than awaiting the normal development of its federal lawsuit, M & L cannot now be heard to complain that its constitutional contentions are being resolved in a state court. Thus M & L's prayers for both injunctive and declaratory relief are subject to *Younger*'s restrictions.

[11] The rule with regard to the co-plaintiffs, Salem and Tim-Rob, is equally clear, insofar as they seek declaratory relief. Salem and Tim-Rob were not subject to state criminal prosecution at any time prior to the issuance of a preliminary injunction by the District Court. Under *Steffel* they thus could at least have obtained a declaratory judgment upon an ordinary showing of entitlement to that relief. The District Court, however, did not grant declaratory relief to Salem and Tim-Rob, but instead granted them preliminary injunctive relief. Whether injunctions of future criminal prosecutions are governed by *Younger* standards is a question which we reserved in both *Steffel*, 415 U.S. at 463, and *Younger*, 401 U.S. at 41. We now hold that on the facts of this case the issuance of a preliminary injunction is not subject to the restrictions of *Younger*. The principle underlying *Younger* and *Samuels* is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding. In the absence of such a proceeding, however, as we recognized in *Steffel*, a plaintiff may challenge the constitutionality of the state statute in federal court, assuming he can satisfy the requirements for federal jurisdiction.

[12] No state proceedings were pending against either Salem or Tim-Rob at the time the District Court issued its preliminary injunction. Nor was there any question that they satisfied

the requirements for federal jurisdiction. As we have already stated, they were assuredly entitled to declaratory relief, and since we have previously recognized that "[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical," we think that Salem and Tim-Rob were entitled to have their claims for preliminary injunctive relief considered without regard to *Younger*'s restrictions. At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary. But prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm. Moreover, neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.

[13] The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*.

[14] But while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion. While we regard the question as a close one, we believe that the issuance of a preliminary injunction in behalf of respondents Salem and Tim-Rob was not an abuse of the District Court's discretion. As required to support such relief, these respondents alleged (and petitioner did not deny) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless.

[15] The other inquiry relevant to preliminary relief is whether respondents made a sufficient showing of the likelihood of ultimate success on the merits. Both the District Court and the Court of Appeals found such a likelihood. The order of the District Court spoke in terms of actually holding the ordinance unconstitutional, but in the context of a preliminary injunction the court must have intended to refer only to the likelihood that respondents ultimately would prevail. The Court of Appeals properly clarified this point.

[16] Although the customary "barroom" type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109,

118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. . . . .

* * *

[17] In [the] circumstances [of this case], and in the light of existing case law, we cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief. This is the extent of our appellate inquiry, and we therefore "intimate no view as to the ultimate merits of [respondents'] contentions." The judgment of the Court of Appeals is reversed as to respondent M & L, and affirmed as to respondents Salem and Tim-Rob.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in the judgment in part and dissenting in part.

[18] While adhering to my [dissenting] position in *Younger v. Harris*, I join the judgment of the Court insofar as it holds that Salem Inn and Tim-Rob were entitled to a preliminary injunction pending disposition of their request for declaratory relief. I do not condone the conduct of M & L in violating the challenged ordinance without awaiting judicial action on its federal complaint, but like the Court of Appeals, I find no compelling reason to distinguish M & L from the other respondents in terms of the relief which is appropriate. I would therefore affirm the judgment below in all respects.

Notes on Doran v. Salem Inn

This case is valuable for a couple of principles. First, an elegant way to avoid the effect of *Younger* and *Hicks v. Miranda* is not to violate a statute or ordinance in the first place. M & L learned this lesson the hard way. Second, a federal judge who is asked to grant a *declaration* under 28 U.S.C. § 2201 can grant a *preliminary injunction* while the case is pending, providing the moving party satisfies the prerequisites for such relief. See ¶ [12] "[P]rior to final judgment," noted Justice Rehnquist, "there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm." ¶ [12].

Wooley v. Maynard
430 U.S. 705 (1977)

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

[1] The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

(1)

[2] Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] . . . the figures or letters on any number plate." The term "letters" . . . has been interpreted by the State's highest court to include the state motto.

[3] Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore assert it objectionable to disseminate this message by displaying it on their automobiles. Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates.

[4] On November 27, 1974, Mr. Maynard was issued a citation for violating [the statute]. On December 6, 1974, he appeared *pro se* in Lebanon, N.H., District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for Mr. Maynard's situation, but considered himself bound by [precedent from a higher court] to hold Maynard guilty. A $25 fine was imposed, but execution was suspended during "good behavior."

[5] On December 28, 1974, Mr. Maynard was again charged with violating [the statute]. He appeared in court on January 31, 1975, and again chose to represent himself; he was found guilty, fined $50, and sentenced to six months in the Grafton County House of Corrections. The court suspended this jail sentence but ordered Mr. Maynard to also pay the $25 fine for the first offense. Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced him to jail for a period of 15 days. He has served the full sentence.

[6] Prior to trial on the second offense Mr. Maynard was charged with yet a third violation of [the statute] on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was "continued for sentence" so that Maynard received no punishment in addition to the 15 days.

(2)

[7] On March 4, 1975, appellees brought the present action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Hampshire. They sought injunctive and declaratory relief against enforcement of [New Hampshire's statutes,] insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto. On March 11, 1975, the single District Judge issued a temporary restraining order against further arrests and prosecutions of the Maynards. Because the appellees sought an injunction against a state statute on grounds of its unconstitutionality, a three-judge District Court was convened pursuant to 28 U.S.C. § 2281. Following a hearing on the merits,

the District Court entered an order enjoining the State "from arresting and prosecuting [the Maynards] at any time in the future for covering over that portion of their license plates that contains the motto 'Live Free or Die.'" We noted probable jurisdiction of the appeal.

(3)

[8] Appellants argue that the District Court was precluded from exercising jurisdiction in this case by the principles of equitable restraint enunciated in *Younger v. Harris*. In *Younger* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. However, when a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights. See *Steffel v. Thompson*, 415 U.S. 452 (1974); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975). *Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. § 1983 for an alleged deprivation of federal rights. Mr. Maynard now finds himself placed "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in [another] criminal proceeding." *Steffel*, 415 U.S. at 462. Mrs. Maynard, as joint owner of the family automobiles, is no less likely than her husband to be subjected to state prosecution. Under these circumstances he cannot be denied consideration of a federal remedy.

[9] Appellants, however, point out that Maynard failed to seek review of his criminal convictions and cite *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), for the propositions that "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court," *id.* at 608, and that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies," *id.* at 609. *Huffman*, however, is inapposite. There the appellee was seeking to prevent, by means of federal intervention, enforcement of a state-court judgment declaring its theater a nuisance. We held that appellee's failure to exhaust its state appeals barred federal intervention under the principles of *Younger*: "Federal post-trial intervention, in a fashion designed to annul the results of a state trial . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction." *Id.*

[10] Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, or to annul any collateral effects those convictions may have, *e.g.*, upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction.

[11] In their complaint, the Maynards sought both declaratory and injunctive relief against the enforcement of the New Hampshire statutes. We have recognized that although "[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical," a "district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." It is correct that generally a court will not enjoin "the enforcement of a criminal statute even though unconstitutional," since "[s]uch a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*. But this is not an absolute policy and in some circumstances injunctive relief may be appropriate. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights."

[12] We have such a situation here for, as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time. The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile, is sufficient to justify injunctive relief. We are therefore unwilling to say that the District Court was limited to granting declaratory relief. Having determined that the District Court was not required to stay its hand as to either appellee, we turn to the merits of the Maynards' claim.

(4)

[In this part of his opinion, the CHIEF JUSTICE concluded that the First and Fourteenth Amendments precluded enforcement of New Hampshire's statutes against the Maynards.]

[13] We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join in part, dissenting in part.

[14] *Steffel v. Thompson* held that when state proceedings are not pending, but only threatened, a declaratory judgment may be entered with respect to the state statute at issue without regard to the strictures of *Younger v. Harris*. But *Steffel* left open whether an injunction should also issue in such circumstances. 415 U.S. at 463. Then *Doran v. Salem Inn* approved issuance by a federal court of a preliminary injunction against a threatened state prosecution, but only pending decision on the declaratory judgment and only then subject to "stringent" standards which should cause a district court to "weigh carefully the interests on both sides," since

prohibiting the enforcement of the State's criminal law against the federal plaintiff, even pending final resolution of his case, "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." Although finding the issuance of a preliminary injunction not an abuse of discretion in that case, the Court also distinguished between a preliminary injunction *pendente lite* and a permanent injunction at the successful conclusion of the federal case; for "a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."

[15] *Doran* was thus true to the teachings of *Douglas v. City of Jeanette*, 319 U.S. 157 (1943), where the Court held that an injunction against threatened state criminal prosecutions should not issue even though the underlying state statute had already been invalidated, relying on the established rule "that courts of equity do not ordinarily restrain criminal prosecutions." A threatened prosecution "even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief . . . ." An injunction should issue only upon a showing that the danger of irreparable injury is both "great and immediate," citing the same authorities to this effect that this Court relied on in *Younger v. Harris*. In each of the cited cases — and they do not exhaust the authorities to the same effect — criminal prosecutions were not pending when this Court ruled that a federal equity court should not enter the injunction. "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional . . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95 (1935).

[16] The Court has plainly departed from the teaching of these cases. The whole point of *Douglas v. City of Jeannette*'s admonition against injunctive relief was that once a declaratory judgment had issued, further equitable relief would depend on the existence of unusual circumstances thereafter. Here the State's enforcement of its statute prior to the declaration of unconstitutionality by the federal court would appear to be no more than the performance of their duty by the State's law enforcement officers. If doing this much prior to the declaration of unconstitutionality amounts to unusual circumstances sufficient to warrant an injunction, the standard is obviously seriously eroded.

[17] Under our cases, therefore, more is required to be shown than the Court's opinion reveals to affirm the issuance of the injunction. To that extent I dissent.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

[In his dissent, Justice Rehnquist argued that New Hampshire's statute did not violate the First and Fourteenth Amendments.]

Notes on Wooley v. Maynard

1. *Wooley v. Maynard* obliquely stands for the *opposite* of what it appears to say. Although the majority, per Chief Justice Burger, *upheld* an award of injunctive relief in favor of the Maynards, Justice White's dissenting opinion effectively explains why courts will often be reluctant to enjoin prosecutions under a state criminal statute, even if the same court hands down a declaration that the statute violates the federal Constitution.

2. As you can see, the appellant in this case, the Chief of Police in Lebanon, New Hampshire, tried to invoke *Huffman v. Pursue* to his aid. See ¶ [9]. In *Huffman*, the Court, per Justice Rehnquist, held that the principles of *Younger* apply at the appellate stage of litigation as much as — or even more so — than at the trial stage. In *Wooley*, however, the Chief Justice distinguished *Huffman* on the ground that the Maynards were not here trying to undo a prior conviction. All they wanted was to preclude prosecutions in the future. See ¶ [10].

3. Former Associate Justice David Souter was "on the brief" in *Wooley*, representing the Chief of Police. He was at that time Attorney General of New Hampshire. See 430 U.S. at 706.

[27-28] **Huffman v. Pursue, Ltd.**
420 U.S. 592 (1975)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

[1] This case requires that we decide whether our decision in *Younger v. Harris* bars a federal district court from intervening in a state civil proceeding such as this, when the proceeding is based on a state statute believed by the district court to be unconstitutional. A similar issue was raised in *Gibson v. Berryhill*, 411 U.S. 564 (1973), but we were not required to decide it because there the enjoined state proceedings were before a biased administrative body which could not provide a necessary predicate for a *Younger* dismissal, that is, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." . . . . Today we do reach the issue, and conclude that in the circumstances presented here the principles of *Younger* are applicable even though the state proceeding is civil in nature.

I

[2] Appellants are the sheriff and prosecuting attorney of Allen County, Ohio. This case arises from their efforts to close the Cinema I Theatre, in Lima, Ohio. Under the management of both . . . Pursue, Ltd., and [its] predecessor, William Dakota, the Cinema I has specialized in the display of films which may fairly be characterized as pornographic, and which in numerous instances have been adjudged obscene after adversary hearings.

[3] Appellants sought to invoke the Ohio public nuisance statute, Ohio Rev. Code Ann. § 3767.01 *et seq.*, against appellee. Section 3767.01(C) provides that a place which exhibits obscene films is a nuisance, while § 3767.06 requires closure for up to a year of any place determined to be a nuisance. The statute also provides for preliminary injunctions pending final determination of status as a nuisance, for sale of all personal property used in conducting the nuisance, and for release from a closure order upon satisfaction of certain conditions (including a showing that the nuisance will not be re-established).

[4] Appellants instituted a nuisance proceeding in the Court of Common Pleas of Allen County against appellee's predecessor, William Dakota. During the course of the . . . legal proceedings which followed, the Court of Common Pleas reviewed 16 movies which had been shown at the theater. The court rendered a judgment that Dakota had engaged in a course of conduct of displaying obscene movies at the Cinema I, and that the theater was therefore to be closed, pursuant to Ohio Rev. Code Ann. § 3767.06, "for any purpose for a period of one year unless sooner released by Order of [the] Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio." The judgment also provided for the seizure and sale of personal property used in the theater's operations.

[5] Appellee, Pursue, Ltd., had succeeded to William Dakota's leasehold interest in the Cinema I prior to entry of the state-court judgment. Rather than appealing that judgment within

the Ohio court system, it immediately filed suit in the United States District Court for the Northern District of Ohio. The complaint was based on 42 U.S.C. § 1983 and alleged that appellants' use of Ohio's nuisance statute constituted a deprivation of constitutional rights under the color of state law. It sought injunctive relief and a declaratory judgment that the statute was unconstitutional and unenforceable. Since the complaint was directed against the constitutionality of a state statute, a three-judge court was convened. The District Court concluded that while the statute was not vague, it did constitute an overly broad prior restraint on First Amendment rights insofar as it permanently or temporarily prevented the showing of films which had not been adjudged obscene in prior adversary hearings. Fashioning its remedy to match the perceived constitutional defect, the court permanently enjoined the execution of that portion of the state court's judgment that closed the Cinema I to films which had not been adjudged obscene. The judgment and opinion of the District Court give no indication that it considered whether it should have stayed its hand in deference to the principles of federalism which find expression in *Younger v. Harris*.

[6] On this appeal, appellants raise the *Younger* problem, as well as a variety of constitutional and statutory issues. We need consider only the applicability of *Younger*.

* * *

III

[7] The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. For example, *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926), involved an effort to enjoin the operation of a state daylight savings act. Writing for the Court, Justice Holmes cited *Fenner v. Boykin* and emphasized a rule that "should be very strictly observed," "that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.

[8] Although Justice Holmes was confronted with a bill seeking an injunction against state executive officers, rather than against state judicial proceedings, we think that the relevant considerations of federalism are of no less weight in the latter setting. If anything, they counsel more heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles." *Cf. Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

[9] The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding. *Younger*, however, also rests upon the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution. Strictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding. Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws.

IV

[10] In spite of the critical similarities between a criminal prosecution and Ohio nuisance proceedings, appellee nonetheless urges that there is also a critical difference between the two which should cause us to limit *Younger* to criminal proceedings. This difference, says appellee, is that whereas a state-court criminal defendant may, after exhaustion of his state remedies, present his constitutional claims to the federal courts through habeas corpus, no analogous remedy is available to one, like appellee, whose constitutional rights may have been infringed in a state proceeding which cannot result in custodial detention or other criminal sanction.

[11] A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right.[a] Thus, appellee in this case was assured of eventual consideration of its claim by this Court. But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which, as we have already explained, is quite costly in terms of the interests which *Younger* seeks to protect.

[12] Appellee's argument, that because there may be no civil counterpart to federal habeas it should have contemporaneous access to a federal forum for its federal claim, apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided on the merits by a federal, rather than a state, court. We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal

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[a]Editor's note: This is no longer the case. The Supreme Court's docket is now almost entirely discretionary.

issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger* militate against such a result.

[13] The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state-court dispositions of federal questions. *Younger* turned on considerations of comity and federalism peculiar to the fact that state proceedings were pending; it did *not* turn on the fact that in any event a criminal defendant could eventually have obtained federal habeas consideration of his federal claims. The propriety of federal-court interference with an Ohio nuisance proceeding must likewise be controlled by application of those same considerations of comity and federalism.

[14] Informed by the relevant principles of comity and federalism, at least three Courts of Appeals have applied *Younger* when the pending state proceedings were civil in nature. [Justice Rehnquist then cited cases.] For the purposes of the case before us, however, we need make no general pronouncements upon the applicability of *Younger* to all civil litigation. It suffices to say that for the reasons heretofore set out, we conclude that the District Court should have applied the tests laid down in *Younger* in determining whether to proceed to the merits of appellee's prayer for relief against this Ohio civil nuisance proceeding.

V

[15] Appellee contends that even if *Younger* is applicable to civil proceedings of this sort, it nonetheless does not govern this case because at the time the District Court acted there was no longer a "pending state court proceeding" as that term is used in *Younger*. *Younger* and [its progeny] have used the term "pending proceeding" to distinguish state proceedings which have already commenced from those which are merely incipient or threatened. Here, of course, the state proceeding had begun long before appellee sought intervention by the District Court. But appellee's point, we take it, is not that the state proceeding had not begun, but that it had ended by the time its District Court complaint was filed.

[16] Appellee apparently relies on the facts that the Allen County Court of Common Pleas had already issued its judgment and permanent injunction when this action was filed, and that no appeal from that judgment has ever been taken to Ohio's appellate courts. As a matter of state procedure, the judgment presumably became final, in the sense of being non-appealable, at some point after the District Court filing, possibly prior to entry of the District Court's own judgment, but surely after the single judge stayed the state court's judgment. We need not, however, engage in such inquiry. For regardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's

posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.

[17] Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement.

[18] Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.

* * *

[19] [Nor do] the considerations of comity and federalism which underlie *Younger* permit . . . truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious. Appellee obviously believes itself possessed of a viable federal claim, else it would not so assiduously seek to litigate in the District Court. Yet, Art. VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do. The District Court should not have entertained this action, seeking pre-appeal interference with a state judicial proceeding, unless appellee established that early intervention was justified under one of the exceptions recognized in *Younger*.

VI

[20] *Younger*, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." As we have noted, the District Court in this case did not rule on the *Younger* issue, and thus apparently has not considered whether its intervention was justified by one of these narrow exceptions. Even if the District Court's opinion can be interpreted as a *sub silentio* determination that the case fits within the exception for statutes which are "flagrantly and patently violative of express constitutional prohibitions," such a characterization of the statute is not possible after [a] subsequent decision of the Supreme Court of Ohio [that] narrowly construed the Ohio nuisance statute, with a view to avoiding the constitutional difficulties which concerned the District Court.

[21] We therefore think that this case is appropriate for remand so that the District Court may consider whether irreparable injury can be shown in light of [the decision of the Supreme Court of Ohio referred to in the previous paragraph,] and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind. The judgment of the District Court is vacated and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

[22] I dissent. The treatment of the state *civil* proceeding as one "in aid of and closely related to criminal statutes" is obviously only the first step toward extending to state *civil* proceedings generally the holding of *Younger v. Harris* that federal courts should not interfere with pending state *criminal* proceedings except under extraordinary circumstances. Similarly, today's holding that the plaintiff in an action under 42 U.S.C. § 1983 may not maintain it without first exhausting state appellate procedures for review of an adverse state trial court decision is but an obvious first step toward discard of heretofore settled law that such actions may be maintained without first exhausting state judicial remedies.

[23] . . . . The line of decisions culminating in *Younger v. Harris* reflects this Court's longstanding recognition that equitable interference by federal courts with pending state prosecutions is incompatible in our federal system with the paramount role of the States in the definition of crimes and the enforcement of criminal laws. Federal-court non-interference with

state prosecution of crimes protects against "the most sensitive source of friction between States and Nation."

[24] The tradition, however, has been quite the opposite as respects federal injunctive interference with pending state civil proceedings. Even though legislation as far back as 1793 has provided in "seemingly uncompromising language," *Mitchum v. Foster*, 407 U.S. 225, 233 (1972), that a federal court "may not grant an injunction to stay proceedings in a State court" with specified exceptions, see 28 U.S.C. § 2283 [the Anti-Injunction Act], the Court has consistently engrafted exceptions upon the prohibition. Many, if not most, of those exceptions have been engrafted under the euphemism "implied." . . . . Indeed, when Congress became concerned that the Court's 1941 decision in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, forecast the possibility that the 1793 Act might be enforced according to its literal terms, Congress amended the Act in 1948 "to restore the basic law as generally understood and interpreted prior to the *Toucey* decision."

[25] Thus today's extension of *Younger v. Harris* turns the clock back and portends once again the resuscitation of the literal command of the 1793 Anti-Injunction Act — that the state courts should be free from interference by federal injunction even in civil cases. This not only would overrule some 18 decades of this Court's jurisprudence but would heedlessly flout Congress' evident purpose in enacting the 1948 amendment to acquiesce in that jurisprudence.

[26] The extension also threatens serious prejudice to the potential federal-court plaintiff not present when the pending state proceeding is a criminal prosecution. That prosecution does not come into existence until completion of steps designed to safeguard him against spurious prosecution — arrest, charge, information, or indictment. In contrast, the civil proceeding, as in this case, comes into existence merely upon the filing of a complaint, whether or not well founded. To deny by fiat of this Court the potential federal plaintiff a federal forum in that circumstance is obviously to arm his adversary (here the public authorities) with an easily wielded weapon to strip him of a forum and a remedy that federal statutes were enacted to assure him. The Court does not escape this consequence by characterizing the state civil proceeding involved here as "in aid of and closely related to criminal statutes." The nuisance action was brought into being by the mere filing of the complaint in state court, and the untoward consequences for the federal plaintiff were thereby set in train without regard to the connection, if any, of the proceeding to the State's criminal laws.

[27] Even if the extension of *Younger v. Harris* to pending state civil proceedings can be appropriate in any case, and I do not think it can be, it is plainly improper in the case of an action by a federal plaintiff, as in this case, grounded upon 42 U.S.C. § 1983. That statute serves a particular congressional objective long recognized and enforced by the Court. Today's extension will defeat that objective. After the War Between the States, "nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." *Zwickler v. Koota*, 389 U.S. 241, 246 (1967). Section 1983 was enacted at that time as § 1 of the Civil Rights Act of 1871. That Act, and the Judiciary Act of 1875, which

granted the federal courts general federal-question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws. These statutes constituted the lower federal courts "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." The fact, standing alone, that state courts also must protect federal rights can never justify a refusal of federal courts to exercise that jurisdiction. This is true notwithstanding the possibility of review by this Court of state decisions for, "even when available by appeal rather than only by discretionary writ of certiorari, [that possibility] is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416 (1964).

[28] Consistently with this congressional objective of the 1871 and 1875 Acts we held in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), that a federal plaintiff suing under § 1983 need not exhaust state administrative or judicial remedies before filing his action under § 1983 in federal district court. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." The extension today of *Younger v. Harris* to require exhaustion in an action under § 1983 drastically undercuts *Monroe v. Pape* and its numerous progeny — the mere filing of a complaint against a potential § 1983 litigant forces him to exhaust state remedies.

* * *

[29] MR. JUSTICE DOUGLAS, while joining in the opinion of MR. JUSTICE BRENNAN, wishes to make clear that he adheres to the view he expressed in *Younger v. Harris*, 401 U.S. 37, 58-65 (1971) (dissenting opinion), that federal abstention from interference with state criminal prosecutions is inconsistent with demands of our federalism where important and overriding civil rights (such as those involved in the First Amendment) are about to be sacrificed.

Notes on Huffman

Huffman stands for two basic propositions. First, the principles of *Younger* apply as much on appeal as at trial. See ¶¶ [17]-[18]. We saw this aspect of *Huffman* previously at work in *Wooley v. Maynard*, where Chief Burger distinguished *Huffman* from the situation presented in that case.

The second proposition of *Huffman* is that the Court will apply the principles of *Younger* in at least some *civil* contexts. Here, the Court justified applying *Younger* to a civil action to abate a nuisance, on the ground that it was "in aid of and closely related to," or "akin to," a criminal prosecution. ¶ [9].

As you can see, although Justice Brennan was willing to concur in the judgment in *Younger*, he drew a sharp line against civil applications of that precedent.

Trainor v. Hernandez
431 U.S. 434 (1977)

MR. JUSTICE WHITE delivered the opinion of the Court.

[1] The Illinois Department of Public Aid (IDPA) filed a lawsuit in the Circuit Court of Cook County, Ill., on October 30, 1974, against appellees Juan and Maria Hernandez, alleging that they had fraudulently concealed assets while applying for and receiving public assistance. Such conduct is a crime under Illinois law. The IDPA, however, proceeded civilly and sought only return of the money alleged to have been wrongfully received.

[2] [Editor's new paragraph.] The IDPA simultaneously instituted an attachment proceeding against appellees' property. Pursuant to the Illinois Attachment Act, the IDPA filed an affidavit setting forth the nature and amount of the underlying claim and alleging that the appellees had obtained money from the IDPA by fraud. The writ of attachment was issued automatically by the clerk of the court upon receipt of this affidavit. The writ was then given to the sheriff who executed it, on November 5, 1974, on money belonging to appellees in a credit union. Appellees received notice of the attachment, freezing their money in the credit union, on November 8, 1974, when they received the writ, the complaint, and the affidavit in support of the writ. The writ indicated a return date for the attachment proceeding of November 18, 1974. Appellees appeared in court on November 18, 1974, and were informed that the matter would be continued until December 19, 1974. Appellees never filed an answer either to the attachment or to the underlying complaint. They did not seek a prompt hearing, nor did they attempt to quash the attachment on the ground that the procedures surrounding its issuance rendered it and the Act unconstitutional.

[3] [Editor's new paragraph.] Instead appellees filed the instant lawsuit in the United States District Court for the Northern District of Illinois on December 2, 1974, seeking, *inter alia*, return of the attached money. The federal complaint alleged that the appellees' property had been attached pursuant to the Act and that the Act was unconstitutional in that it provided for the deprivation of debtors' property without due process of law. Appellees as plaintiffs sought to represent a class of those "who have had or may have their property attached without notice or hearing upon the creditor's mere allegation of fraudulent conduct pursuant to the Illinois Attachment Act." They named as defendants appellants Trainor and O'Malley, officials of the IDPA, and sought declaration of a defendant class made up of all the court clerks in the Circuit Courts of Illinois, and of another defendant class of all sheriffs in Illinois. They sought an injunction against Trainor and O'Malley forbidding them to seek attachments under the Act and an injunction against the clerks and sheriffs forbidding them to issue or serve writs of attachment under the Act. Appellees also sought preliminary relief in the form of an order directing the Sheriff of Cook County to release the property which had been attached. Finally, appellees sought the convening of a three-judge court pursuant to 28 U.S.C. § 2284.

[4] The District Court declined to rule on the request for preliminary relief because the parties had agreed that one-half of the money in the credit union would be returned. A three-judge court was convened. It certified the suit as a plaintiff and defendant class action as appellees had requested. In an opinion dated December 19, 1975, almost one year after the return date of the attachment in state court, it declined to dismiss the case under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), stating:

> In *Huffman*, the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger*, based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman*.

[5] Proceeding to the merits, [the court] held [various sections] of the Act to be "on [their face] patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." It ordered the clerk of the court and the Sheriff of Cook County to return to appellees the rest of their attached property; it enjoined all clerks and all sheriffs from issuing or serving attachment writs pursuant to the Act and ordered them to release any currently held attached property to its owner; and it enjoined appellants Trainor and O'Malley from authorizing applications for attachment writs pursuant to the Act. Appellants appealed to this Court[,] claiming that under *Younger* and *Huffman* principles the District Court should have dismissed the suit without passing on the constitutionality of the Act and that the Act is in any event constitutional. Since we agree with appellants that *Younger* and *Huffman* principles do apply here, we do not reach their second claim.

[6] Because our federal and state legal systems have overlapping jurisdiction and responsibilities, we have frequently inquired into the proper role of a federal court, in a case pending before it and otherwise within its jurisdiction, when litigation between the same parties and raising the same issues is or apparently soon will be pending in a state court. More precisely, when a suit is filed in a federal court challenging the constitutionality of a state law under the Federal Constitution and seeking to have state officers enjoined from enforcing it, should the federal court proceed to judgment when it appears that the State has already instituted proceedings in the state court to enforce the challenged statute against the federal plaintiff and the latter could tender and have his federal claims decided in the state court?

[7] *Younger v. Harris* and *Samuels v. Mackell*, 401 U. S. 66 (1971), addressed these questions where the already pending state proceeding was a criminal prosecution and the federal plaintiff sought to invalidate the statute under which the state prosecution was brought. In these circumstances, the Court ruled that the Federal District Court should issue neither a declaratory

judgment nor an injunction but should dismiss the case. The first justification the Court gave for this rule was simply the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

[8] Beyond the accepted rule that equity will ordinarily not enjoin the prosecution of a crime, however, the Court voiced a "more vital consideration," namely, that in a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts. Relying on cases that declared that courts of equity should give "scrupulous regard [to] the rightful independence of state governments," the Court held, that in this intergovernmental context, the two classic preconditions for the exercise of equity jurisdiction assumed new dimensions. Although the existence of an adequate remedy at law barring equitable relief normally would be determined by inquiring into the remedies available in the federal rather than in the state courts, *Great Lakes Co. v. Huffman*, 319 U.S. 293, 297 (1943), here the inquiry was to be broadened to focus on the remedies available in the pending state proceeding. "The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Younger v. Harris*, 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926)). Dismissal of the federal suit "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson v Berryhill*, 411 U.S. 564, 577 (1973). "The policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975).

[9] The Court also concluded that the other precondition for equitable relief — irreparable injury — would not be satisfied unless the threatened injury was both great and immediate. The burden of conducting a defense in the criminal prosecution was not sufficient to warrant interference by the federal courts with legitimate state efforts to enforce state laws; only extraordinary circumstances would suffice. As the Court later explained, to restrain a state proceeding that afforded an adequate vehicle for vindicating the federal plaintiff's constitutional rights "would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility equally with the federal courts" to safeguard constitutional rights and would "reflec[t] negatively upon the state court's ability" to do so. . . . .

[10] *Huffman* involved the propriety of a federal injunction against the execution of a judgment entered in a pending state-court suit brought by the State to enforce a nuisance statute. Although the state suit was a civil rather than a criminal proceeding, *Younger* principles were held to require dismissal of the federal suit. Noting that the State was a party to the nuisance proceeding and that the nuisance statute was "in aid of and closely related to criminal statutes," the Court concluded that a federal injunction would be "an offense to the State's interest in the nuisance litigation [which] is likely to be every bit as great as it would be were this a criminal

proceeding." Thus, while the traditional maxim that equity will not enjoin a criminal prosecution strictly speaking did not apply to the nuisance proceeding in *Huffman*, the "more vital consideration" of comity counseled restraint as strongly in the context of the pending state civil enforcement action as in the context of a pending criminal proceeding. In these circumstances, it was proper that the federal court stay its hand.

[11] We have recently applied the analysis of *Huffman* to proceedings similar to state civil enforcement actions — judicial contempt proceedings. *Juidice v. Vail*, 430 U.S. 327 (1977). The Court again stressed the "more vital consideration" of comity underlying the *Younger* doctrine and held that the state interest in vindicating the regular operation of its judicial system through the contempt process — whether that process was labeled civil, criminal, or quasi-criminal — was sufficiently important to preclude federal injunctive relief unless *Younger* standards were met.

[12] These cases control here. An action against appellees was pending in state court when they filed their federal suit. The state action was a suit by the State to recover from appellees welfare payments that allegedly had been fraudulently obtained. The writ of attachment issued as part of that action. The District Court thought that *Younger* policies were irrelevant because suits to recover money and writs of attachment were available to private parties as well as the State; it was only because of the coincidence that the State was a party that the suit was "arguably" in aid of the criminal law. But the fact remains that the State was a party to the suit in its role of administering its public-assistance programs. Both the suit and the accompanying writ of attachment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs. The state authorities also had the option of vindicating these policies through criminal prosecutions. Although, as in *Juidice*, the State's interest here is "[p]erhaps . . . not quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding[,] the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity.

[13] For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state

enforcement actions is readily apparent.[9] This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which *Younger* and *Samuels v. Mackell* primarily rest apply in full force here. The pendency of the state-court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extraordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim.

[14] No extraordinary circumstances warranting equitable relief were present here. There is no suggestion that the pending state action was brought in bad faith or for the purpose of harassing appellees. It is urged that this case comes within the exception that we said in *Younger* might exist where a state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Even if such a finding was made below, which we doubt, it would not have been warranted in light of our cases.

[15] As for whether appellees could have presented their federal due process challenge to the attachment statute in the pending state proceeding, that question, if presented below, was not addressed by the [court], which placed its rejection of *Younger* and *Huffman* on broader grounds. The issue is heavily laden with local law, and we do not rule on it here in the first instance.[10]

[16] The grounds on which the District Court refused to apply the principles of *Younger* and *Huffman* were infirm; it was therefore error, on those grounds, to entertain the action on

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[9]Appellees argue that the injunction issued below in no way interfered with a pending state case. They point to the fact that only the attachment proceeding was interfered with — the underlying fraud action may continue unimpeded — and claim that the attachment proceeding is not a court proceeding within the doctrine of *Younger* and *Huffman*. In this regard they rely on *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Gerstein v. Pugh*, 420 U.S. 103 (1975). None of these cases control here. In this case the attachment was issued by a court clerk and is very much a part of the underlying action for fraud. Moreover, the attachment in this case contained a return date on which the parties were to appear in *court* and at which time the appellees would have had an opportunity to contest the validity of the attachment. Thus the attachment proceeding was "pending" *in the state courts* within the *Younger* and *Huffman* doctrine at the time of the federal suit.

[10]The parties are in disagreement on this issue, the State squarely asserting, and the appellees denying, that the federal due process claim could have been presented and decided in the pending attachment proceeding. MR. JUSTICE STEVENS, in dissent, offers additional reasons — not relied on by appellees and not addressed by the State — for concluding that the state suit did not offer an adequate forum for litigating the federal claim. We do not resolve these conflicting views.

behalf of either the named or the unnamed plaintiffs and to reach the issue of the constitutionality of the Illinois attachment statute.

[17] The judgment is therefore reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART substantially agrees with the views expressed in the dissenting opinions of MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS. Accordingly, he respectfully dissents from the opinion and judgment of the Court.

[The concurring opinion of Justice Blackmun is omitted.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

[18] The Court continues on, to me, the wholly improper course of extending *Younger* principles to deny a federal forum to plaintiffs invoking 42 U.S.C. § 1983 for the decision of meritorious federal constitutional claims when a *civil* action that might entertain such claims is pending in a state court. Because I am of the view that the decision patently disregards Congress' purpose in enacting § 1983 — to open federal courts to the decision of such claims without regard to the pendency of such state civil actions — and because the decision indefensibly departs from prior decisions of this Court, I respectfully dissent.

I

[19] An attachment proceeding against appellees' credit union savings was instituted by the Illinois Department of Public Aid (IDPA) under the Illinois Attachment Act simultaneously with the filing of a civil lawsuit in state court for the recovery of public welfare funds allegedly fraudulently obtained. The attachment was initiated when IDPA filled in the blanks on a standard-form "Affidavit for Attachment" stating:

> The defendants *Juan and Maria Hernandez* within two years preceding the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay *their* creditors.

(Italics indicate matter inserted in blanks by IDPA.)

[20] The wording of the affidavit repeats almost verbatim the language of the Illinois Act, and provides no underlying factual allegations upon which a determination can be made whether the conclusion of fraudulent concealment or disposition of property is justified. The writ of attachment was issued as a matter of course by the clerk of the court upon receipt of the affidavit, and the writ was executed on November 5, 1974.

[21] Appellees appeared in state court on the return date, November 18, 1974, and were informed that the hearing on the validity of the attachment was continued until December 19, 1974. In the meantime appellees — deprived of the use of their savings — faced pending rent and car repair bills, and past due electricity, gas, and telephone bills. On December 2, appellees filed a complaint under 42 U.S.C. § 1983 in Federal District Court seeking a declaratory judgment and an injunction against enforcement of the Illinois Attachment Act. On December 5, two weeks before the continued state-court hearing, appellees sought a temporary restraining order to release their credit union savings from the custody of the sheriff. The District Court effected an agreement between the parties whereby IDPA agreed to the release of one-half of the attached funds, and accordingly did not act on the motion for the temporary restraining order.

[22] A three-judge District Court was convened. The District Court found that it was not required to abstain from deciding the constitutional merits of appellees' challenge, and enjoined the enforcement of the Act on the ground that the Act was "patently and flagrantly violative of the constitution." This Court reverses and holds that the District Court should have dismissed the suit, thus continuing the course initiated in *Huffman v. Pursue, Ltd.*, and furthered this Term in *Juidice v. Vail*, 430 U.S. 327 (1977), of extending *Younger* principles to pending civil actions.

II

[23] I have already set out at some length the reasons for my disagreement with the Court's extension of *Younger* abstention principles to civil cases, particularly actions under 42 U.S.C. § 1983, and will not repeat them here. The Court suggests that this case, like *Huffman*, involves a statute enacted in aid of the criminal law. In *Huffman*, the State of Ohio brought a statutory nuisance suit in state court to close a theater that had previously been adjudged to have shown obscene films. *Huffman* stated, in words quoted by the Court today, that the nuisance proceeding "was in aid of and closely related to criminal statutes." . . . .

[24] Emphasizing that [here] the State sued in state court to "vindicate important state policies," the Court concludes that "the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity."

[25] In framing the [matter] this narrowly, the Court apparently desires once more to leave "for another day" the question of the applicability of *Younger* abstention principles to civil suits generally. But the Court's insistence that "the interests of comity and federalism on which *Younger* and *Samuels v. Mackell* primarily rest apply in full force here" is the signal that "merely the formal announcement is being postponed." *Juidice*, 430 U.S. at 345 n. (BRENNAN, J., dissenting). *Younger* and *Samuels* dismissed federal-court suits because the plaintiffs sought injunctions against pending criminal prosecutions. I agreed with those results because "[p]ending state criminal proceedings have always been viewed as paradigm cases involving paramount state interests." *Juidice*, 430 U.S. at 345 n. (BRENNAN, J., dissenting). But abstention

principles developed to avoid interfering with state criminal prosecutions are manifestly inapplicable here.

[26] In this case the federal plaintiffs seek an injunction only against the use of statutory attachment proceedings which, properly speaking, are not part of the pending civil suit at all. The relief granted here in no way interfered with or prevented the State from proceeding with its suit in state court. It merely enjoined the use of an unconstitutional mechanism for attaching assets from which the State hoped to satisfy its judgment if it prevailed on the merits of the underlying lawsuit. To say that the interest of the State in continuing to use an unconstitutional attachment mechanism to insure payment of a liability not yet established brings into play "in full force" "all the interest of comity and federalism" present in a state criminal prosecution is simply wrong.

* * *

[27] The principles that give strength to *Younger* simply do not support an inflexible rule against federal courts' enjoining state civil proceedings. *Younger* was justified primarily on the basis of the longstanding rule that "courts of equity . . . particularly should not act to restrain a criminal prosecution." A comparably rigid rule against enjoining civil proceedings was never suggested until *Huffman*, for in civil proceedings it cannot be assumed that state interests of compelling importance outweigh the interests of litigants seeking vindication of federal rights in federal court, particularly under a statute expressly enacted by Congress to provide a federal forum for that purpose. Even assuming that federal abstention might conceivably be appropriate in some civil cases, the transformation of what I must think can only be an exception into an absolute rule crosses the line between abstention and abdication.

III

[28] Even assuming, *arguendo*, the applicability of *Younger* principles, I agree with the District Court that the Illinois Attachment Act falls within one of the established exceptions to those principles. As an example of an "extraordinary circumstance" that might justify federal-court intervention, *Younger* referred to a statute that "might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Explicitly relying on this exception to *Younger*, the District Court held that the Illinois Act is "patently and flagrantly violative of the constitution." The Court holds [to the contrary, stating that, even] if [a proper] finding was made below, which we doubt[,] it would not have been warranted in light of our cases." I disagree.

[29] Obviously, a requirement that the [*Younger*] formulation must be literally satisfied renders the exception meaningless, and, as my Brother STEVENS demonstrates, elevates to a literalistic definitional status what was obviously meant only to be illustrative and non-exhaustive. The human mind does not possess a clairvoyance that can foresee whether "every

clause, sentence and paragraph" of a statute will be unconstitutional "in whatever manner and against whomever an effort might be made to apply it." The only sensible construction of the test is to treat the "every clause, etc.," wording as redundant, at least when decisions of this Court make clear that the challenged statute is "patently and flagrantly violative of the Constitution."
. . . .

[30] Clearly the Illinois Attachment Act is "patently and flagrantly violative of express constitutional prohibitions" under the relevant decisions of this Court. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), struck down a Georgia garnishment statute that permitted the issuance of a writ of garnishment by the court clerk upon the filing of an affidavit containing only conclusory allegations, and under which there was "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." The Illinois Attachment Act is constitutionally indistinguishable from the Georgia statute struck down in *North Georgia Finishing*. As in that case, the affidavit filed here contained only conclusory allegations, which in this case were taken from a preprinted form requiring only that the affiant fill in the names of the persons whose property he wished to attach. Upon the filing of this form affidavit, the court clerk issued the writ of attachment as a matter of course. Far from requiring an "early hearing" at which to challenge the validity of the attachment, the Illinois Act provided that the party seeking the attachment could unilaterally set the return date of the writ at any time from 10 to 60 days from the date of its execution. And, as this case demonstrates, the 60-day interval does not necessarily represent the outer limit for the actual hearing date, for the Illinois court here was willing to grant a 30-day continuance beyond the date provided in the writ of attachment, even though appellees appeared in court on the proper date and wished to go forward with the hearing at that time.

* * *

[31] The Court gives only bare citations to [our decisions in this area], and declines to discuss or analyze them in even the most cursory manner. These decisions so clearly support the District Court's holding under any sensible construction of the *Younger* exception that the Court's silence, and its insistence upon compliance with the literal wording of [*Younger*], only confirms my conviction that the Court is determined to extend to "state *civil* proceedings generally the holding of *Younger*, *Huffman v. Pursue, Ltd.*, and to give its exceptions the narrowest possible reach. I respectfully dissent.

MR. JUSTICE STEVENS, dissenting.

* * *

[32] The Court's decision to remand this litigation to the District Court to decide whether the Illinois attachment procedure provides a debtor with an appropriate forum in which to challenge the constitutionality of the Illinois attachment procedure is ironic. For that

procedure includes among its undesirable features a set of rules which effectively foreclose any challenge to its constitutionality in the Illinois courts.

[33] Although it is true that § 27 of the Illinois Attachment Act allows the defendant to file a motion to quash the attachment, the purpose of such a motion is to test the sufficiency and truth of the facts alleged in the affidavit or the adequacy of the attachment bond. Section 28 of the Act precludes consideration of any other issues. Even if — contrary to a fair reading — the statute might be construed to allow consideration of a constitutional challenge on a motion to quash, a trial judge may summarily reject such a challenge without fear of reversal; for an order denying such a motion is interlocutory and nonappealable. The ruling on the validity of an attachment does not become final until the underlying tort or contract claim is resolved. At that time the attachment issue will, of course, be moot because the prevailing party will then be entitled to the property regardless of the validity of the attachment.

[34] Because it is so clear that the proceeding pending in the state court did not afford the appellees in this case an adequate remedy for the violation of their federal constitutional rights, the Court's disposition points up the larger problem confronting litigants who seek to challenge any state procedure as violative of the Due Process Clause of the Fourteenth Amendment.

[35] As I suggested in my separate opinion in *Juidice v. Vail*, a principled application of the rationale of *Younger v. Harris* forecloses abstention in cases in which the federal challenge is to the constitutionality of the state procedure itself. Since this federal plaintiff raised a serious question about the fairness of the Illinois attachment procedure, and since that procedure does not afford a plain, speedy, and efficient remedy for his federal claim, it necessarily follows that *Younger* abstention is inappropriate.

* * *

[36] I respectfully dissent.

Notes on Trainor

1. Was the writ of attachment sufficiently integrated with the action for fraud for the Court to conclude that *Younger* applied to both? As you can see, the majority, per Justice White, said yes. See ¶¶ [12], [13] n.9. Writing in dissent, Justice Brennan said no. See ¶ [26].

2. *Patently and flagrantly unconstitutional?* Was Texas' statute authorizing attachments "patently and flagrantly unconstitutional," such that *Younger* would not apply? Consider Justice Brennan's argument to this effect. See ¶¶ [28]-[31]. Is he correct? How does Justice White respond to this argument? See ¶ [14]. Is his response persuasive?

3. *No opportunity to raise federal constitutional objections?* Justice Stevens argues that the Hernandez's couldn't present their constitutional claims effectively in the state

proceedings. See ¶¶ [32]-[33]. (If so, as you know, one of the exceptions to *Younger* would apply.) Is he right? How does Justice White respond? See ¶ [15] & n.10. If you were the state judge in this case, and the Hernandez's made their arguments about due process to you, would you reach the issue, even if §§ 27 and 28 told you not to? What role would the Supremacy Clause play in your analysis? See Art. VI, cl. [2]. Also, can Justice Stevens be certain that an extraordinary writ, such as prohibition, could not be sought from the Illinois appellate courts on this issue? *Cf.* Ky. Civ. R. 76.36; *3M Co. v. Engle*, 328 S.W.3d 184, 187 (Ky. 2010) (quoting *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004)) (Writ may issue "where 'the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.'").

4. As you can see from *Trainor*, the Court is willing, at least in certain contexts, to give *Younger* a broad scope of operation. This was very much in evidence in *Moore v. Sims*, 442 U.S. 415 (1979). This case arose from an action by Texas state officials to remove children from a domestic situation they thought was abusive. While proceedings regarding custody were pending in state court, the parents brought a wide-ranging action attacking many aspects of the state's legislation in this area. Among other things, the parents attacked the system Texas used to receive reports of alleged abuse. The three-judge district court refused to apply *Younger*, partly on the ground that this system was not directly at issue in state proceeding. No matter, said Justice Rehnquist, writing for the Court:

> Under established principles of equity, the exercise of equitable powers is inappropriate if there is an adequate remedy at law. Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceedings." *Juidice v. Vail*, 430 U.S. 327, 337 (1977). The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings. The District Court's reference to the child-abuse reporting system reflects a misunderstanding of the nature of the inquiry. That the Department's suit does not necessarily implicate [this system] is not determinative. The question is whether that challenge can be raised in the pending state proceedings subject to conventional limits on justiciability. On this point, Texas law [regarding permissive counterclaims] is apparently as accommodating as the federal forum. Certainly, abstention is appropriate unless state law clearly bars the interposition of the constitutional claims.

Moore v. Sims, 442 U.S. at 424-26. Writing in dissent, Justice Stevens argued that, "[a]s to [the Sims'] constitutional claims, the hearing to be afforded in state court on parental fitness and permanent custody was virtually as irrelevant as a hearing on a traffic violation." *Id.* at 439 (Stevens, J., dissenting).

5. *Administrative application*. *Younger* was first applied in an administrative context in 1982, in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). This case involved a disciplinary action in New Jersey against an attorney by the Middlesex County Ethics Committee. (This committee had initial responsibility for the action, with ultimate responsibility lying with the Supreme Court of New Jersey.) While the committee was proceeding, the attorney and others brought an action in federal court attacking various aspects of the disciplinary system. The Court, per Chief Justice Burger, held that *Younger* applied. "The policies underlying *Younger*," he wrote, " are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Id.* at 432 (citing *Moore v. Sims* and *Huffman v. Pursue*). The Chief Justice then set forth a three-part test for the application of *Younger* that cuts a wide swath:

> The question in this case is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Middlesex County, 457 U.S. at 432. As you can imagine, a wide variety of proceedings can meet this test. If a proceeding is judicial in nature, if it implicates important state interests, and if the would-be federal plaintiff is able to raise his or her federal constitutional claims there, *Younger* will apply under this test. As you will see, the "*Middlesex* trilogy" was essentially put to the side in *NOPSI* and demoted in *Sprint*.

6. Younger *and Big Oil. Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1 (1987), was a *Younger* case of Shakespearean dimensions. Getty, a third company, agreed to sell its oil interests to Pennzoil, but Texaco bought them instead. Pennzoil then sued Texaco for tortious inducement of breach in Texas state court. A jury brought in a plaintiff's verdict of $7.53 billion in actual damages and $3 billion in punitive damages. Texaco understandably sought an appeal, but, under Texas' rules of civil procedure, it had to post a massive supersedeas while it did so. The situation was dire indeed for Texaco. As Justice Powell explained:

> Even before the trial court entered judgment, the jury's verdict cast a serious cloud on Texaco's financial situation. The amount of the bond required by [Texas' rule of civil procedure] would have been more than $13 billion. It is clear that Texaco would not have been able to post such a bond. Accordingly, "the business and financial community concluded that Pennzoil would be able, under the lien and bond provisions of Texas law, to commence enforcement of any judgment entered on the verdict before Texaco's appeals had been resolved." The effects on Texaco were substantial: the price of its stock dropped markedly; it had difficulty obtaining credit; the

> rating of its bonds was lowered; and its trade creditors refused to sell it crude oil on customary terms.

Pennzoil, 481 U.S. at 5 (quoting and citing the findings of the district court below, which had enjoined Pennzoil from seeking attachments.) Confronted with this situation, Texaco went to federal court in New York and asked for an injunction to prevent Pennzoil from executing on the judgment, arguing that the judgment violated both statutory and constitutional federal law. The federal court granted the injunction and the Second Circuit affirmed, but the Supreme Court reversed. "The reasoning of *Juidice* controls here," wrote Justice Powell:

> That case rests on the importance to the States of enforcing the orders and judgments of their courts. There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt. Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts.

Pennzoil, 481 U.S. at 13-14. Six days later, Texaco filed for bankruptcy. In fact, earlier in the litigation, Texaco's lawyers had worked out a code for quick response to developments in Texas. "White Plains" signified the federal court where Texaco sought (and initially obtained) its injunction, and "Foley Square" signified the bankruptcy court where Texaco ultimately sought protection. See Thomas Petzinger, Jr., Oil & Honor: The Texaco-Pennzoil Wars 427-28 (1987). The case settled for $3 billion. See Tamar Lewin, Pennzoil-Texaco Fight Raised Key Questions, New York Times, Dec. 19, 1987.

[29] New Orleans Public Service Inc. v. Council of the City of New Orleans
491 U.S. 350 (1989)

JUSTICE SCALIA delivered the opinion of the Court.

[1] In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), we held that for purposes of setting intrastate retail rates a State may not differ from the Federal Energy Regulatory Commission's allocations of wholesale power by imposing its own judgment of what would be just and reasonable. Last Term, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), we held that FERC's allocation of the $3 billion-plus cost of the Grand Gulf 1 nuclear reactor among the operating companies that jointly agreed to finance its construction and operation pre-empted Mississippi's inquiry into the prudence of a utility retailer's decision to participate in the joint venture. Today we confront once again a legal issue arising from the question of who must pay for Grand Gulf 1. Here the state ratemaking authority deferred to FERC's implicit finding that New Orleans Public Service, Inc.'s decision to participate in the Grand Gulf venture was reasonable, but determined that the costs incurred thereby should not be completely reimbursed because, it asserted, the utility's management was negligent in failing later to diversify its supply portfolio by selling a portion of its Grand Gulf power. Whether the State's decision to provide less than full reimbursement for the FERC-allocated wholesale costs conflicts with our holdings in *Nantahala* and *Mississippi Power & Light* is not at issue in this case. Rather, we address the threshold question whether the District Court, which the utility petitioned for declaratory and injunctive relief from the state ratemaking authority's order, properly abstained from exercising jurisdiction in deference to the state review process.

I

[2] Because the abstention questions at stake here have little to do with the intricacies of the factual and procedural history underlying the controversy, we may sketch the background of this case in brief. Petitioner New Orleans Public Service, Inc. (NOPSI), a producer, wholesaler, and retailer of electricity that provides retail electrical service to the city of New Orleans, is one of four wholly owned operating subsidiaries of Middle South Utilities, Inc. Middle South operates an integrated "power pool" in which each of the four operating companies transmits produced electricity to a central dispatch center and draws back from the dispatch center the power it needs to meet customer demand. In 1974, NOPSI and its fellow operating companies entered a contract with Middle South Energy, Inc. (MSE), another wholly owned Middle South subsidiary, whereby the operating companies agreed to finance MSE's construction and operation of two 1250 megawatt nuclear reactors, Grand Gulf 1 and 2, in return for the right to the reactors' electrical output. The estimated cost of completing the two reactors was $1.2 billion.

[3] During the late 1970's, consumer demand turned out to be far lower than expected, and regulatory delays, enhanced construction requirements, and high inflation led to spiraling

costs. As a result, construction of Grand Gulf 2 was suspended, and the cost of completing Grand Gulf 1 alone eventually exceeded $3 billion. Not surprisingly, the cost of the electricity produced by the reactor greatly exceeded that of power generated by Middle South's conventional facilities.

[4] Acting pursuant to its exclusive regulatory authority over interstate wholesale power transactions, FERC conducted extensive proceedings to determine "just and reasonable" rates for Grand Gulf 1 power and to prescribe a "just, reasonable, and nondiscriminatory" allocation of Grand Gulf's costs and output. In June 1985, the Commission issued a final order, in which it concluded that, because the planned nuclear reactors had been designed "to meet overall System needs and objectives," the Middle South subsidiaries should pay for the Grand Gulf project "roughly in proportion to each company's share of System demand." The Commission allocated 17 percent of Grand Gulf costs (approximately $13 million per month) to NOPSI, rejecting Middle South's proposal of 29.8 percent as well as the 9 percent figure favored by the respondent here, the New Orleans City Council.

* * *

[5] When NOPSI sought from the New Orleans City Council — the local ratemaking body with final authority over the utility's retail rates — a rate increase to cover the increase in wholesale rates resulting from FERC's allocation of Grand Gulf costs, the Council denied an immediate rate adjustment, explaining that a public hearing was necessary to explore "the legality and prudency [*sic*] of the [contracts relating to Grand Gulf 1, and] the prudency [*sic*] and reasonableness of the said expenses." NOPSI responded by filing an action for injunctive and declaratory relief in the United States District Court for the Eastern District of Louisiana, asserting that federal law *required* the Council to allow it to recover, through an increase in retail rates, its FERC-allocated share of the Grand Gulf expenses.

[6] The District Court granted the Council's motion to dismiss, holding that pursuant to the Johnson Act, 28 U.S.C. § 1342, it had no jurisdiction to entertain the action, and that even if it had jurisdiction it would be compelled by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to abstain. On appeal, the Fifth Circuit initially reversed on both grounds, but later, on its own motion, vacated its earlier opinion in part and held that abstention was proper both under *Burford* and under *Younger v. Harris*, 401 U.S. 37 (1971).

[7] By resolution of October 10, 1985, while [the federal litigation] was still pending before the Fifth Circuit, the Council initiated an investigation into the prudence of NOPSI's involvement in Grand Gulf 1. . . . .

[8] In November 1985, NOPSI filed a second suit in the United States District Court for the Eastern District of Louisiana, seeking to preclude the Council from requiring NOPSI or its shareholders to absorb any of NOPSI's FERC-allocated share of the Grand Gulf costs. The

District Court dismissed the suit as unripe, but held in the alternative that abstention was appropriate. On appeal, the Fifth Circuit affirmed the judgment on ripeness grounds.

[9] The Council completed its prudence review on February 4, 1988, and immediately entered a final order disallowing $135 million of the Grand Gulf costs. The order was based on the Council's determinations that "NOPSI's . . . oversight and review of its Grand Gulf obligation . . . was uncritical and severely deficient," and that NOPSI acted imprudently in failing to reduce the risk of its Grand Gulf commitment, in the wake of the Three Mile Island nuclear incident in March 1979, "by selling all or part of its share off-system."

[10] Upon receipt of the Council's decree, NOPSI turned once again to the District Court for the Eastern District of Louisiana, seeking declaratory and injunctive relief on the ground that, in light of this Court's recent decision in *Nantahala*, the Council's rate order was pre-empted by federal law. Although the District Court expressed considerable doubt as to the merits of the Council's position on the pre-emption question, it concluded that, notwithstanding *Nantahala*, it should still abstain from deciding the suit.

[11] Anticipating that the District Court might again abstain, NOPSI had filed a petition for review of the Council's order in the Civil District Court for the Parish of Orleans, Louisiana. As filed, NOPSI's petition raised only state-law claims and federal due process and takings claims, but NOPSI informed the state court by letter that it would amend to raise its federal pre-emption claim if the federal court once again dismissed its complaint. When that happened, it did so.[3]

[12] In the parallel federal proceedings, the Fifth Circuit affirmed the District Court's dismissal, agreeing that the case was effectively controlled by [the previous federal decision], *i.e.*, that *Burford* and *Younger* abstention applied. We granted certiorari.

II

* * *

[13] [We now] address the question whether the District Court, relying on *Burford v. Sun Oil Co.* and *Younger v. Harris*, properly declined to exercise its jurisdiction in the present case. While we acknowledge that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, n.9

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[3]NOPSI's state suit has since been consolidated with a declaratory judgment action filed earlier by the Council, seeking a declaration that the rate order represented a just and reasonable exercise of regulatory power and that NOPSI's failure to comply with the order would be unlawful, and with a suit filed by a local consumers' rights organization, the Alliance for Affordable Energy, seeking to force the Council to disallow all or at least a larger proportion of the Grand Gulf costs. That case is still pending.

(1987), the policy considerations supporting *Burford* and *Younger* are sufficiently distinct to justify independent analyses.

A

[14] In *Burford v. Sun Oil Co.*, a Federal District Court sitting in equity was confronted with a Fourteenth Amendment challenge to the reasonableness of the Texas Railroad Commission's grant of an oil drilling permit. The constitutional challenge was of minimal federal importance, involving solely the question whether the commission had properly applied Texas' complex oil and gas conservation regulations. Because of the intricacy and importance of the regulatory scheme, Texas had created a centralized system of judicial review of commission orders, which "permit[ted] the state courts, like the Railroad Commission itself, to acquire a specialized knowledge" of the regulations and industry. We found the state courts' review of commission decisions "expeditious and adequate" and, because the exercise of equitable jurisdiction by comparatively unsophisticated Federal District Courts alongside state-court review had repeatedly led to "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy," we concluded that "a sound respect for the independence of state action requir[ed] the federal equity court to stay its hand."

* * *

[15] From [this and other cases], we have distilled the principle now commonly referred to as the "*Burford* doctrine." Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).

[16] The present case does not involve a state-law claim, nor even an assertion that the federal claims are "in any way entangled in a skein of state-law that must be untangled before the federal case can proceed," *McNeese v. Board Of Education for Community Unit School Dist. 187, Cahokia*, 373 U.S. 668, 674 (1963). The Fifth Circuit acknowledged as much in [the previous federal litigation], but found "the absence of a state law claim . . . not fatal" because, it thought, "[t]he motivating force behind *Burford* abstention is . . . a reluctance to intrude into state proceedings where there exists a complex state regulatory system." Finding that this case involved a complex regulatory scheme of "paramount local concern and a matter which demands local administrative expertise," it held that the District Court appropriately applied *Burford*.

[17] While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a

process, or even in all cases where there is a "potential for conflict" with state regulatory law or policy. Here, NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem." *Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341, 347 (1951).

* * *

[18] [In] the case at bar, no inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal Power Act. Such an inquiry would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity. It may, of course, result in an injunction against enforcement of the rate order, but "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."

[19] It is true that in its initial complaint, NOPSI asserted, as an alternative to its facial pre-emption challenge, that the rate order's nominal emphasis on NOPSI's failure in 1979-1980 to diversify its power supply by selling off a portion of its Grand Gulf allocation was merely a cover for the determination that the original Grand Gulf investment was itself unwise. Unlike the facial challenge, this claim cannot be resolved on the face of the rate order, because it hinges largely on the plausibility of the Council's finding that NOPSI should have, and could have, diversified its supply portfolio and thereby lowered its average wholesale costs. Analysis of this pretext claim requires an inquiry into industry practice, wholesale rates, and power availability during the relevant time period, an endeavor that demands some level of industry-specific expertise. But since, as the facts of this case amply demonstrate, wholesale electricity is not bought and sold within a predominantly local market, it does *not* demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies. The principles underlying *Burford* are therefore not implicated.

B

* * *

[20] [With regard to *Younger*,] NOPSI's challenge must stand or fall upon the answer to the question whether the Louisiana court action is the type of proceeding to which *Younger* applies. Viewed in isolation, it plainly is not. Although our concern for comity and federalism has led us to expand the protection of *Younger* beyond state criminal prosecutions, to civil enforcement proceedings, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *Moore v. Sims*, 442 U.S. 415, 423 (1979), and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts'

ability to perform their judicial functions, see *Juidice v. Vail*, 430 U.S. 327, 336, n.12 (1977) civil contempt order); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (requirement for the posting of bond pending appeal), it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.

[21] In asserting that *Younger* is applicable, however, respondents focus not upon the Louisiana court action in isolation, but upon that action as a mere continuation of the Council proceeding. Their contention is that "[t]he Council's own ratemaking and prudence inquiry, even though complete, constitutes an 'ongoing proceeding' because it is subject to state judicial review." The proper question, they contend, is whether the *Council proceeding* qualified for *Younger* treatment because if it did, the proceeding is not complete until judicial review is concluded. Respondents argue by analogy to the treatment of court proceedings, for *Younger* purposes, as an uninterruptible whole. When, in a proceeding to which *Younger* applies, a state trial court has entered judgment, the losing party cannot, of course, pursue equitable remedies in federal district court while concurrently challenging the trial court's judgment on appeal. For *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign. For the same reason, a party may not procure federal intervention by terminating the state judicial process prematurely forgoing the state appeal to attack the trial court's judgment in federal court. "[A] necessary concomitant of *Younger* is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court." *Huffman v. Pursue, Ltd.*, 420 U.S. at 608. Respondents urge that these principles apply equally where the initial adjudicatory tribunal is an agency — *i.e.* that the litigation, from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no more permitted at the conclusion of the administrative stage than during it.

[22] We will assume, without deciding, that this is correct.[4] Respondents' case for abstention still requires, however, that the *Council proceeding* be the sort of proceeding entitled to *Younger* treatment. We think it is not. While we have expanded *Younger* beyond criminal

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[4]In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), we held that the *Younger* doctrine prevented an injunction against an *ongoing* sex discrimination proceeding before the Ohio Civil Rights Commission. The only other decision of ours arguably applying *Younger* to an administrative proceeding, *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982), similarly involved a situation in which the proceeding was not yet at an end. The fact that *Dayton Christian Schools* relied, as an alternative argument, upon the fact that the federal challenge could be made upon appeal to the state courts, suggests, perhaps, that an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final. But we have never squarely faced the question.

proceedings, and even beyond proceedings in courts, we have never extended it to proceedings that are not "judicial in nature." See *Middlesex*, 457 U.S. at 433-34 ("It is clear beyond doubt that the New Jersey Supreme Court considers its bar disciplinary proceedings as 'judicial in nature.' As such, the proceedings are of a character to warrant federal-court deference"). See also *Dayton Christian Schools*, 477 U.S. at 627 ("Because we found that the administrative proceedings in *Middlesex* were 'judicial in nature' from the outset[,] it was not essential to the decision that they had progressed to state-court review by the time we heard the federal injunction case"). The Council's proceedings in the present case were not judicial in nature.

* * *

[23] As a challenge to completed legislative action, NOPSI's suit [does not represent] the interference with ongoing judicial proceedings against which *Younger* was directed . . . . It is, insofar as our policies of federal comity are concerned, no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance — which we would assuredly not require to be brought in state courts. See *Wooley v. Maynard*, 430 U.S. 705, 711 (1977). It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future — or, as in the present circumstances, even a pending — state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts. Viewed, as it should be, as no more than a state-court challenge to completed legislative action, the Louisiana suit comes within none of the exceptions that *Younger* and later cases have established.

[24] For the reasons stated, the judgment of the Court of Appeals is reversed, and the cases remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

[25] I join the Court's opinion. I continue to adhere to my view, however, that the abstention doctrine of *Younger v. Harris* is in general inapplicable to civil proceedings.

[The opinion of Justice Rehnquist, concurring in Parts I and II-B and concurring in the judgment, is omitted.]

[The opinion of Justice Blackmun, concurring in the judgment, is omitted.]

Notes on NOPSI

1. As Justice Scalia observes, NOPSI brought a parallel action in state court attacking the Council's decision to disallow $135 million in costs. See ¶ [11]. It probably had two reasons for doing so. First, it was probably trying to hedge its bets. If the federal court

abstained under *Younger*, or if it dismissed the case under the Johnson Act (which we will presently discuss), it could consolidate its federal claims with its claims in state court and be sure to have at least one forum for them. As we will see, Sprint did the same thing in *Sprint Communications v. Jacobs*, a case coming up in the reader. Second, the Johnson Act forbade NOPSI from bringing certain claims in federal court under any circumstances. As to these claims, NOPSI's only option was to seek review in state court.

The Johnson Act provides as follows:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; *and*,
>
> (2) The order does not interfere with interstate commerce; *and*,
>
> (3) The order has been made after reasonable notice and hearing; *and*,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342. This statute precluded NOPSI from bringing any claim sounding in takings or due process in federal court if Louisiana provided a "plain, speedy and efficient remedy" in its courts, which was obviously the case, given that NOPSI could attack the Council's decision in state court and in fact was doing so. NOPSI argued, however, that one of its arguments did not fall under the Johnson Act, specifically, its argument that FERC's determination of NOPSI's financial responsibility for the failed plant pre-empted the Council's discretion. In other words, NOPSI argued that FERC's determination *required* the Council to allow NOPSI to pass its responsibility for the failed plant on to its customers. Although the District Court held that the Johnson Act precluded this claim, the Fifth Circuit disagreed. See *New Orleans Public Serv. Co., Inc. v. City of New Orleans*, 782 F.2d 1236, 1242-43, modified on other grounds, 798 F.2d 858 (5th Cir. 1986). As the Fifth Circuit put the matter:

> The Johnson Act removes federal jurisdiction of claims which rely "solely" on "repugnance of the order to the Federal Constitution." As NOPSI's claim raises a federal question about the preemptory effect of the Federal Power Act [which FERC administers], it cannot be seen to rely "solely" on constitutional grounds. A statutorily-based preemption claim will not provide a basis for invoking the Johnson Act to deprive the federal courts of jurisdiction.

NOPSI, 782 F.2d at 1242.

2. As you can see, *NOPSI* appeared to limit the reach of *Burford* abstention somewhat. As Justice Scalia observed, although an adverse decision from the federal courts might well *frustrate* Louisiana's vision of good public policy, it would not interfere with an otherwise complex, coherent regulatory scheme. See ¶ [18].

3. *NOPSI* also limited the reach of *Younger* somewhat. After reiterating the principle from earlier cases that *Younger* only protects proceedings that are "judicial in nature," see ¶ [22], Justice Scalia went on to reason that even some *judicial* proceedings are beyond the scope of *Younger*. In the specific context of *NOPSI*, this includes attacks on legislative and quasi-legislative rules that have reached final form. See ¶¶ [20], [28]. More broadly, Justice Scalia suggested that *Younger* was limited to "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." ¶ [20]. This taxonomy stood in somewhat stark contrast to the expansive formulation that Chief Justice Burger set forth in *Middlesex County*. The Court resolved this discrepancy in *Sprint*, the next main case.

Sprint Communications, Inc. v. Jacobs
134 S.Ct. 584 (2013)

JUSTICE GINSBURG delivered the opinion of the Court.

[1] This case involves two proceedings, one pending in state court, the other in federal court. Each seeks review of an Iowa Utilities Board order. And each presents the question whether Windstream Iowa Communications, Inc., a local telecommunications carrier, may impose on Sprint Communications, Inc., intrastate access charges for telephone calls transported via the Internet. Federal-court jurisdiction over controversies of this kind was confirmed in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002). Invoking *Younger v. Harris*, 401 U.S. 37 (1971), the U.S. District Court for the Southern District of Iowa abstained from adjudicating Sprint's complaint in deference to the parallel state-court proceeding, and the Court of Appeals for the Eighth Circuit affirmed the District Court's abstention decision.

[2] We reverse the judgment of the Court of Appeals. In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U. S. 350, 373 (1989) ("[T]here is no doctrine that . . . pendency of state judicial proceedings excludes the federal courts."). This Court has recognized, however, certain instances in which the prospect of undue interference with state proceedings counsels against federal relief.

[3] *Younger* exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from

enjoining the state prosecution. This Court has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), or that implicate a State's interest in enforcing the orders and judgments of its courts, see *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987). We have cautioned, however, that federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not "refus[e] to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368.

[4] Circumstances fitting within the *Younger* doctrine, we have stressed, are "exceptional"; they include, as catalogued in *NOPSI*, "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 367–68. Because this case presents none of the circumstances the Court has ranked as "exceptional," the general rule governs: "[T]he pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

I

[5] Sprint, a national telecommunications service provider, has long paid intercarrier access fees to the Iowa communications company Windstream (formerly Iowa Telecom) for certain long distance calls placed by Sprint customers to Windstream's in-state customers. In 2009, however, Sprint decided to withhold payment for a subset of those calls, classified as Voice over Internet Protocol (VoIP), after concluding that the Telecommunications Act of 1996 preempted intrastate regulation of VoIP traffic.[1] In response, Windstream threatened to block all calls to and from Sprint customers.

[6] Sprint filed a complaint against Windstream with the IUB asking the Board to enjoin Windstream from discontinuing service to Sprint. In Sprint's view, Iowa law entitled it to withhold payment while it contested the access charges and prohibited Windstream from carrying out its disconnection threat. In answer to Sprint's complaint, Windstream retracted its threat to discontinue serving Sprint, and Sprint moved, successfully, to withdraw its complaint. Because the conflict between Sprint and Windstream over VoIP calls was "likely to recur," however, the IUB decided to continue the proceedings to resolve the underlying legal question, *i.e.*, whether VoIP calls are subject to intrastate regulation. *Order in Sprint Communications Co. v. Iowa Telecommunications Servs., Inc.*, No. FCU–2010–0001 (IUB, Feb. 1, 2010), p. 6 (IUB Order). The question retained by the IUB, Sprint argued, was governed by federal law, and was not

[1]The Federal Communications Commission has yet to provide its view on whether the Telecommunications Act categorically preempts intrastate access charges for VoIP calls. See *In re Connect America Fund*, 26 FCC Rcd. 17663, 18002, ¶ 934 (2011) (reserving the question whether all VoIP calls "must be subject exclusively to federal regulation").

within the IUB's adjudicative jurisdiction. The IUB disagreed, ruling that the intrastate fees applied to VoIP calls.[2]

[7] Seeking to overturn the Board's ruling, Sprint commenced two lawsuits. First, Sprint sued the members of the IUB in their official capacities in the United States District Court for the Southern District of Iowa. In its federal-court complaint, Sprint sought a declaration that the Telecommunications Act of 1996 preempted the IUB's decision; as relief, Sprint requested an injunction against enforcement of the IUB's order. Second, Sprint petitioned for review of the IUB's order in Iowa state court. The state petition reiterated the preemption argument Sprint made in its federal-court complaint; in addition, Sprint asserted state law and procedural due process claims. Because Eighth Circuit precedent effectively required a plaintiff to exhaust state remedies before proceeding to federal court, see *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (1990), Sprint urges that it filed the state suit as a protective measure. Failing to do so, Sprint explains, risked losing the opportunity to obtain any review, federal or state, should the federal court decide to abstain after the expiration of the Iowa statute of limitations.[4]

[8] As Sprint anticipated, the IUB filed a motion asking the Federal District Court to abstain in light of the state suit, citing *Younger v. Harris*, 401 U.S. 37 (1971). The District Court granted the IUB's motion and dismissed the suit. The IUB's decision, and the pending state-court review of it, the District Court said, composed one "uninterruptible process" implicating important state interests. On that ground, the court ruled, *Younger* abstention was in order.

[9] For the most part, the Eighth Circuit agreed with the District Court's judgment. The Court of Appeals rejected the argument, accepted by several of its sister courts, that *Younger* abstention is appropriate only when the parallel state proceedings are "coercive," rather than "remedial," in nature. *Cf. Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 522 (1st Cir. 2009) ("[P]roceedings must be coercive, and in most cases, state-initiated, in order to warrant abstention."). Instead, the Eighth Circuit read this Court's precedent to require *Younger* abstention whenever "an ongoing state judicial proceeding . . . implicates important state interests, and . . . the state proceedings provide adequate opportunity to raise [federal] challenges." 690 F.3d at 867 (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432 (1982)). Those criteria were satisfied here, the appeals court held, because the ongoing state-court review of the IUB's decision concerned Iowa's "important state

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[2]At the conclusion of the IUB proceedings, Sprint paid Windstream all contested fees.

[4]Since we granted certiorari, the Iowa state court issued an opinion rejecting Sprint's preemption claim on the merits. *Sprint Communications Co. v. Iowa Utils. Bd.*, No. CV–8638, App. to Joint Supp. Brief 20a–36a (Iowa Dist. Ct., Sept. 16, 2013). The Iowa court decision does not, in the parties' view, moot this case, and we agree. Because Sprint intends to appeal the state-court decision, the "controversy . . . remains live." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 291, n.7 (2005).

interest in regulating and enforcing its intrastate utility rates." Recognizing the "possibility that the parties [might] return to federal court," however, the Court of Appeals vacated the judgment dismissing Sprint's complaint. In lieu of dismissal, the Eighth Circuit remanded the case, instructing the District Court to enter a stay during the pendency of the state-court action.

[10] We granted certiorari to decide whether, consistent with our delineation of cases encompassed by the *Younger* doctrine, abstention was appropriate here.[5]

II

A

[11] Neither party has questioned the District Court's jurisdiction to decide whether federal law preempted the IUB's decision, and rightly so. In *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002), we reviewed a similar federal-court challenge to a state administrative adjudication. In that case, as here, the party seeking federal-court review of a state agency's decision urged that the Telecommunications Act of 1996 preempted the state action. We had "no doubt that federal courts ha[d federal question] jurisdiction under [28 U.S.C.] § 1331 to entertain such a suit," *id.* at 642, and nothing in the Telecommunications Act detracted from that conclusion.

[12] Federal courts, it was early and famously said, have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Jurisdiction existing, this Court has cautioned, a federal court's "obligation" to hear and decide a case is "virtually unflagging." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Parallel state-court proceedings do not detract from that obligation.

[13] In *Younger*, we recognized a "far-from-novel" exception to this general rule. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364 (1989). The plaintiff in *Younger* sought federal-court adjudication of the constitutionality of the California Criminal Syndicalism Act. Requesting an injunction against the Act's enforcement, the federal-court plaintiff was at the time the defendant in a pending state criminal prosecution under the Act. In those circumstances, we said, the federal court should decline to enjoin the prosecution, absent bad faith, harassment, or a patently invalid state statute. Abstention was in order, we explained, under "the basic doctrine of equity jurisprudence that courts of equity should not act . . . to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparably injury if denied equitable relief." *Id.* at 43–44. "[R]estraining equity jurisdiction within narrow limits," the Court observed, would "prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions."

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[5]The IUB agrees with Sprint that our decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), cannot independently sustain the Eighth Circuit's abstention analysis.

Id. at 44. We explained as well that this doctrine was "reinforced" by the notion of "comity," that is, a proper respect for state functions."

[14] We have since applied *Younger* to bar federal relief in certain civil actions. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), is the pathmarking decision. There, Ohio officials brought a civil action in state court to abate the showing of obscene movies in Pursue's theater. Because the State was a party and the proceeding was "in aid of and closely related to [the State's] criminal statutes," the Court held *Younger* abstention appropriate. *Id.* at 604.

[15] More recently, in *NOPSI*, the Court had occasion to review and restate our *Younger* jurisprudence. *NOPSI* addressed and rejected an argument that a federal court should refuse to exercise jurisdiction to review a state council's ratemaking decision. "[O]nly exceptional circumstances," we reaffirmed, "justify a federal court's refusal to decide a case in deference to the States." 491 U.S. at 368. Those "exceptional circumstances" exist, the Court determined after surveying prior decisions, in three types of proceedings. First, *Younger* precluded federal intrusion into ongoing state criminal prosecutions. Second, certain "civil enforcement proceedings" warranted abstention. *Id.* Finally, federal courts refrained from interfering with pending "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." 491 U.S. at 368 (citing *Juidice v. Vail*, 430 U.S. 327, 336, n.12 (1977), and *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13 (1987)). We have not applied *Younger* outside these three "exceptional" categories, and today hold, in accord with *NOPSI*, that they define *Younger*'s scope.

B

[16] The IUB does not assert that the Iowa state court's review of the Board decision, considered alone, implicates *Younger*. Rather, the initial administrative proceeding justifies staying any action in federal court, the IUB contends, until the state review process has concluded. The same argument was advanced in *NOPSI*. We will assume without deciding, as the Court did in *NOPSI*, that an administrative adjudication and the subsequent state court's review of it count as a "unitary process" for *Younger* purposes. *Id.* at 369. The question remains, however, whether the initial IUB proceeding is of the "sort . . . entitled to *Younger* treatment." *Id.*

[17] The IUB proceeding, we conclude, does not fall within any of the three exceptional categories described in *NOPSI* and therefore does not trigger *Younger* abstention. The first and third categories plainly do not accommodate the IUB's proceeding. That proceeding was civil, not criminal in character, and it did not touch on a state court's ability to perform its judicial function. *Cf. Juidice*, 430 U.S. at 336 n.12 (civil contempt order); *Pennzoil*, 481 U.S. at 13 (requirement for posting bond pending appeal).

[18] Nor does the IUB's order rank as an act of civil enforcement of the kind to which *Younger* has been extended. Our decisions applying *Younger* to instances of civil enforcement

have generally concerned state proceedings "akin to a criminal prosecution" in "important respects." *Huffman*, 420 U.S. at 604. See also *Middlesex*, 457 U.S. at 432 (*Younger* abstention appropriate where "noncriminal proceedings bear a close relationship to proceedings criminal in nature"). Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act. See, *e.g.*, *Middlesex*, 457 U.S. at 433–34 (state-initiated disciplinary proceedings against lawyer for violation of state ethics rules). In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action. See, *e.g.*, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state-initiated administrative proceedings to enforce state civil rights laws); *Moore v. Sims*, 442 U.S. 415, 419–20 (1979) (state-initiated proceeding to gain custody of children allegedly abused by their parents); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (civil proceeding "brought by the State in its sovereign capacity" to recover welfare payments defendants had allegedly obtained by fraud); *Huffman*, 420 U.S. at 598 (state-initiated proceeding to enforce obscenity laws). Investigations are commonly involved, often culminating in the filing of a formal complaint or charges.

[19] The IUB proceeding does not resemble the state enforcement actions this Court has found appropriate for *Younger* abstention. It is not "akin to a criminal prosecution." *Huffman*, 420 U.S. at 604. Nor was it initiated by "the State in its sovereign capacity." *Trainor*, 431 U.S. at 444. A private corporation, Sprint, initiated the action. No state authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint.

[20] In its brief, the IUB emphasizes Sprint's decision to withdraw the complaint that commenced proceedings before the Board. At that point, the IUB argues, Sprint was no longer a willing participant, and the proceedings became, essentially, a civil enforcement action.[6] The IUB's adjudicative authority, however, was invoked to settle a civil dispute between two private parties, not to sanction Sprint for commission of a wrongful act. Although Sprint withdrew its complaint, administrative efficiency, not misconduct by Sprint, prompted the IUB to answer the underlying federal question. By determining the intercarrier compensation regime applicable to VoIP calls, the IUB sought to avoid renewed litigation of the parties' dispute. Because the underlying legal question remained unsettled, the Board observed, the controversy was "likely to recur." Nothing here suggests that the IUB proceeding was "more akin to a criminal prosecution than are most civil cases." *Huffman*, 420 U.S. at 604.

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[6]To determine whether a state proceeding is an enforcement action under *Younger*, several Courts of Appeals, inquire whether the underlying state proceeding is "coercive" rather than "remedial." See, *e.g.*, *Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir. 2010). Though we referenced this dichotomy once in a footnote, see *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 n.2 (1986), we do not find the inquiry necessary or inevitably helpful, given the susceptibility of the designations to manipulation.

[21] In holding that abstention was the proper course, the Eighth Circuit relied heavily on this Court's decision in *Middlesex*. *Younger* abstention was warranted, the Court of Appeals read *Middlesex* to say, whenever three conditions are met: There is (1) "an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) . . . provide[s] an adequate opportunity to raise [federal] challenges." 690 F.3d at 867 (citing *Middlesex*, 457 U.S. at 432). Before this Court, the IUB has endorsed the Eighth Circuit's approach.

[22] The Court of Appeals and the IUB attribute to this Court's decision in *Middlesex* extraordinary breadth. We invoked *Younger* in *Middlesex* to bar a federal court from entertaining a lawyer's challenge to a New Jersey state ethics committee's pending investigation of the lawyer. Unlike the IUB proceeding here, the state ethics committee's hearing in *Middlesex* was indeed "akin to a criminal proceeding." As we noted, an investigation and formal complaint preceded the hearing, an agency of the State's Supreme Court initiated the hearing, and the purpose of the hearing was to determine whether the lawyer should be disciplined for his failure to meet the State's standards of professional conduct. The three *Middlesex* conditions recited above were not dispositive; they were, instead, *additional* factors appropriately considered by the federal court before invoking *Younger*.

[23] Divorced from their quasi-criminal context, the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest. That result is irreconcilable with our dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the "exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Colorado River*, 424 U.S. at 813). In short, to guide other federal courts, we today clarify and affirm that *Younger* extends to the three "exceptional circumstances" identified in *NOPSI*, but no further.

* * *

[24] For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is

Reversed.

Notes on Sprint

1. *Sprint* resolved the tension between the broad language of the "*Middlesex* trilogy" and the relatively narrow taxonomy of *NOPSI*, in favor of the latter. See ¶¶ [22]-[23]. But administering *Sprint* may prove harder than the Court seems to suppose. Consider *Sprint* itself. Sprint brought a complaint before the IUB, arguing that Windstream was improperly refusing to connect its VoIP calls, hoping to reserve the federal issues underlying its dispute with Windstream for a federal forum. The IUB, on its own motion, later reached and resolved the federal issues against Sprint. The Court said *Younger* did not apply because the proceeding was

not a civil enforcement action. See ¶¶ [19]-[20]. But what if Iowa recognized a new kind of tort, such as "improperly withholding payments under a tariff," and gave the IUB power to investigate alleged commissions of this tort? Could the IUB then have invoked *Younger* successfully? Or, to take another example, what if Louisiana had given the New Orleans City Council authority to investigate allegations of "tortious failure to diversify a utility's portfolio," and what if, pursuant to that authority, the Council had investigated NOPSI's decision not to sell off part of its exposure to the failed nuclear plant? Would *Younger* then have applied to *NOPSI*?

2. We learned about "*England* reservations" while we were discussing *Pullman* abstention. As a conventional matter, a party makes such a reservation when he or she is shunted to state court because of *Pullman* abstention, but he or she does not want the state court to resolve the federal issue that lies behind the state action. In *Sprint*, Sprint made — or tried to make — an *England* reservation in a *Younger* context. It wanted the IUB to tell Windstream to abide by the terms of its tariff, but it did not want the IUB to reach or resolve the question of whether VoIP was exclusively governed by federal law.

3. *Sprint* provides a glimpse into the world of public utilities. Windstream, the "incumbent local carrier" in Iowa (*i.e.*, the local descendant of Ma Bell), had to submit a "tariff" to the IUB, which then governed virtually all of its relations with customers — including large commercial customers like Sprint. Tariffs were an innovation of the Progressive era. The idea was that they would prevent utilities — originally railroads — from varying their charges from customer to customer. The model of the Progressive era is gradually eroding, for a variety of reasons, including substantial variation among customers and competitors. See generally Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated Industries Law, 98 Colum. L. Rev. 1323 (1998). For those of you who have had Constitutional Law II, you may recall that a tariff was at issue in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

[30] Colorado River Water Conservation District v. United States
424 U.S. 800 (1976)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1] The McCarran Amendment, 43 U.S.C. § 666, provides that "consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." The questions presented by this case concern the effect of the McCarran Amendment upon the jurisdiction of the federal district courts under 28 U.S.C. § 1345 over suits for determination of water rights brought by the United States as trustee for certain Indian tribes and as owner of various non-Indian Government claims.[1]

I

[2] It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water. As southwestern populations have grown, conflicting claims to this scarce resource have increased. To meet these claims, several Southwestern States have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource. [Colorado is one of those states.]

[3] Under the Colorado Act, the State is divided into seven Water Divisions, each Division encompassing one or more entire drainage basins for the larger rivers in Colorado. Adjudication of water claims within each Division occurs on a continuous basis. Each month, Water Referees in each Division rule on applications for water rights filed within the preceding five months or refer those applications to the Water Judge of their Division. Every six months, the Water Judge passes on referred applications and contested decisions by Referees. A State Engineer and engineers for each Division are responsible for the administration and distribution of the waters of the State according to the determinations in each Division.

[4] Colorado applies the doctrine of prior appropriation in establishing rights to the use of water. Under that doctrine, one acquires a right to water by diverting it from its natural source

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[1] * * *

28 U.S.C. § 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion.

[5] The reserved rights of the United States extend to Indian reservations and other federal lands, such as national parks and forests. The reserved rights claimed by the United States in this case affect waters within Colorado Water Division No. 7. On November 14, 1972, the Government instituted this suit in the United States District Court for the District of Colorado, invoking the court's jurisdiction under 28 U.S.C. § 1345. The District Court is located in Denver, some 300 miles from Division 7. The suit, against some 1,000 water users, sought declaration of the Government's rights to waters in certain rivers and their tributaries located in Division 7. In the suit, the Government asserted reserved rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law. It sought appointment of a water master to administer any waters decreed to the United States. Prior to institution of this suit, the Government had pursued adjudication of non-Indian reserved rights and other water claims based on state law in Water Divisions 4, 5, and 6, and the Government continues to participate fully in those Divisions.

[6] Shortly after the federal suit was commenced, one of the defendants in that suit filed an application in the state court for Division 7, seeking an order directing service of process on the United States in order to make it a party to proceedings in Division 7 for the purpose of adjudicating all of the Government's claims, both state and federal. On January 3, 1973, the United States was served pursuant to authority of the McCarran Amendment. Several defendants and intervenors in the federal proceeding then filed a motion in the District Court to dismiss on the ground that under the Amendment, the court was without jurisdiction to determine federal water rights. Without deciding the jurisdictional question, the District Court, on June 21, 1973, granted the motion in an unreported oral opinion stating that the doctrine of abstention required deference to the proceedings in Division 7. On appeal, the Court of Appeals for the Tenth Circuit reversed, holding that the suit of the United States was within district-court jurisdiction under 28 U.S.C. § 1345, and that abstention was inappropriate. We granted certiorari to consider the important questions of whether the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court's dismissal in this case was nevertheless appropriate. We reverse.

II

[7] We first consider the question of district-court jurisdiction under 28 U.S.C. § 1345. That section provides that the district courts shall have original jurisdiction over all civil actions brought by the Federal Government "[e]xcept as otherwise provided by Act of Congress." It is thus necessary to examine whether the McCarran Amendment is such an Act of Congress excepting jurisdiction under § 1345.

[8] The McCarran Amendment does not by its terms, at least, indicate any repeal of jurisdiction under § 1345. . . . .

[9] Beyond its terms, the legislative history of the Amendment evidences no clear purpose to terminate any portion of § 1345 jurisdiction. Indeed, three bills, proposed at approximately the same time as the Amendment, which expressly would have had the effect of precluding suits by the United States in district court for the determination of water rights, failed of passage. Further, the Senate report on the Amendment states: "The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water . . . . ." Nothing in this statement of purpose indicates an intent correlatively to diminish federal-district-court jurisdiction. Similarly, Senator McCarran, who introduced the legislation in the Senate, stated in a letter made a part of the Senate report that the legislation was "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream."

[10] In view of the McCarran Amendment's language and legislative history, controlling principles of statutory construction require the conclusion that the Amendment did not constitute an exception "provided by Act of Congress" that repealed the jurisdiction of district courts under § 1345 to entertain federal water suits. . . . . Not only do the terms and legislative history of the McCarran Amendment not indicate an intent to repeal § 1345, but also there is no irreconcilability in the operation of both statutes. The immediate effect of the Amendment is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water. There is no irreconcilability in the existence of concurrent state and federal jurisdiction. Such concurrency has, for example, long existed under federal diversity jurisdiction. Accordingly, we hold that the McCarran Amendment in no way diminished federal-district-court jurisdiction under § 1345 and that the District Court had jurisdiction to hear this case.

III

* * *

B

[11] Next, we consider whether the District Court's dismissal was appropriate under the doctrine of abstention. We hold that the dismissal cannot be supported under that doctrine in any of its forms.

[12] Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases

can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). Our decisions have confined the circumstances appropriate for abstention to three general categories.

[13] (a) Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. at 189. See, *e.g.*, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). This case, however, presents no federal constitutional issue for decision.

[14] (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), for example, involved such a question. In particular, the concern there was with the scope of the eminent domain power of municipalities under state law. In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), for example, the Court held that a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells should have been dismissed by the District Court. The reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields.

[15] The present case clearly does not fall within this second category of abstention. While state claims are involved in the case, the state law to be applied appears to be settled. No questions bearing on state policy are presented for decision. Nor will decision of the state claims impair efforts to implement state policy as in *Burford.* To be sure, the federal claims that are involved in the case go to the establishment of water rights which may conflict with similar rights based on state law. But the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction. The potential conflict here, involving state claims and federal claims, would not be such as to impair impermissibly the State's effort to effect its policy respecting the allocation of state waters. Nor would exercise of federal jurisdiction here interrupt any such efforts by restraining the exercise of authority vested in state officers.

[16] (c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, *Younger v. Harris*, 401 U.S. 37 (1971); state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places

exhibiting obscene films, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); or collection of state taxes, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Like the previous two categories, this category also does not include this case. We deal here neither with a criminal proceeding, nor such a nuisance proceeding, nor a tax collection. We also do not deal with an attempt to restrain such actions or to seek a declaratory judgment as to the validity of a state criminal law under which criminal proceedings are pending in a state court.

C

[17] Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

[18] It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. . . . . In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal.

[19] Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions

of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

* * *

[20] Beyond the congressional policy expressed by the McCarran Amendment and consistent with furtherance of that policy, we also find significant (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300-mile distance between the District Court in Denver and the court in Division 7, and (d) the existing participation by the Government in Division 4, 5, and 6 proceedings. We emphasize, however, that we do not overlook the heavy obligation to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceeding were in some respect inadequate to resolve the federal claims. But the opposing factors here, particularly the policy underlying the McCarran Amendment, justify the District Court's dismissal in this particular case.

[21] The judgment of the Court of Appeals is reversed and the judgment of the District Court dismissing the complaint is affirmed for the reasons here stated.

It is so ordered.

JUSTICE STEWART, with whom JUSTICE BLACKMUN and JUSTICE STEVENS concur, dissenting.

[22] The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree. The Court further says that the McCarran Amendment "in no way diminished" the District Court's jurisdiction. I agree. The Court also says that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." I agree. And finally, the Court says that nothing in the abstention doctrine "in any of its forms" justified the District Court's dismissal of the Government's complaint. I agree. These views would seem to lead ineluctably to the conclusion that the District Court was wrong in dismissing the complaint. Yet the Court holds that the order of dismissal was "appropriate." With that conclusion I must respectfully disagree.

[23] In holding that the United States shall not be allowed to proceed with its lawsuit, the Court relies principally on cases reflecting the rule that where "control of the property which is

the subject of the suit [is necessary] in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." But, as those cases make clear, this rule applies only when exclusive control over the subject matter is necessary to effectuate a court's judgment. Here the federal court did not need to obtain *in rem* or *quasi in rem* jurisdiction in order to decide the issues before it. The court was asked simply to determine as a matter of federal law whether federal reservations of water rights had occurred, and, if so, the date and scope of the reservations. The District Court could make such a determination without having control of the river.

* * *

[24] The Court's principal reason for deciding to close the doors of the federal courthouse to the United States in this case seems to stem from the view that its decision will avoid piecemeal adjudication of water rights.[6] To the extent that this view is based on the special considerations governing *in rem* proceedings, it is without precedential basis . . . . To the extent that the Court's view is based on the realistic practicalities of this case, it is simply wrong, because the relegation of the Government to the state courts will not avoid piecemeal litigation.

[25] The Colorado courts are currently engaged in two types of proceedings under the State's water-rights law. First, they are processing new claims to water based on recent appropriations. Second, they are integrating these new awards of water rights with all past decisions awarding such rights into one all-inclusive tabulation for each water source. The claims of the United States that are involved in this case have not been adjudicated in the past. Yet they do not involve recent appropriations of water. In fact, these claims are wholly dissimilar to normal state water claims, because they are not based on actual beneficial use of water but rather on an intention formed at the time the federal land use was established to reserve

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[6]The Court lists four other policy reasons for the "appropriateness" of the District Court's dismissal of this lawsuit. All of those reasons are insubstantial. First, the fact that no significant proceedings had yet taken place in the federal court at the time of the dismissal means no more than that the federal court was prompt in granting the defendants' otion to dismiss. At that time, of course, no proceedings involving the Government's claims had taken place in the state court either. Second, the geographic distance of the federal court from the rivers in question is hardly a significant factor in this age of rapid and easy transportation. Since the basic issues here involve the determination of the amount of water the Government intended to reserve rather than the amount it actually appropriated on a given date, there is little likelihood that live testimony by water district residents would be necessary. In any event, the Federal District Court in Colorado is authorized to sit at Durango, the headquarters of Water Division 7. Third, the Government's willingness to participate in some of the state proceedings certainly does not mean that it had no right to bring this action, unless the Court has today unearthed a new kind of waiver. Finally, the fact that there were many defendants in the federal suit is hardly relevant. It only indicates that the federal court had all the necessary parties before it in order to issue a decree finally setting the Government's claims. . . . .

a certain amount of water to support the federal reservations. The state court will, therefore, have to conduct separate proceedings to determine these claims. And only after the state court adjudicates the claims will they be incorporated into the water source tabulations. If this suit were allowed to proceed in federal court the same procedures would be followed, and the federal court decree would be incorporated into the state tabulation, as other federal court decrees have been incorporated in the past. Thus, the same process will occur regardless of which forum considers these claims. Whether the virtually identical separate proceedings take place in a federal court or a state court, the adjudication of the claims will be neither more nor less "piecemeal." Essentially the same process will be followed in each instance.

[26] As the Court says, it is the virtual "unflagging obligation" of a federal court to exercise the jurisdiction that has been conferred upon it. Obedience to that obligation is particularly "appropriate" in this case, for at least two reasons.

[27] First, the issues involved are issues of federal law. A federal court is more likely than a state court to be familiar with federal water law and to have had experience in interpreting the relevant federal statutes, regulations, and Indian treaties. Moreover, if tried in a federal court, these issues of federal law will be reviewable in a federal appellate court, whereas federal judicial review of the state courts' resolution of issues of federal law will be possible only on review by this Court in the exercise of its certiorari jurisdiction.

[28] Second, some of the federal claims in this lawsuit relate to water reserved for Indian reservations. It is not necessary to determine that there is no state-court jurisdiction of these claims to support the proposition that a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians. This Court has long recognized that "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'"

[29] The Court says that "[o]nly the clearest of justifications will warrant dismissal" of a lawsuit within the jurisdiction of a federal court. In my opinion there was no justification at all for the District Court's order of dismissal in this case.

[30] I would affirm the judgment of the Court of Appeals.

[The dissenting opinion of Justice Stevens is omitted.]

Notes on Colorado River

1. As this case demonstrates, the mere pendency of a parallel *in personam* proceeding in state court is not supposed to justify abstention by the federal court. See ¶ [12]. Such parallel litigation is actually fairly common. Consider, for example, a non-diverse tort action against an insured in state court. At the same time, the diverse *insurer* may be suing the

insured in federal court for a declaration of non-coverage. The cases would not be identical, but they would present many of the same issues.

2. None of the conventional forms of abstention appeared to apply in this case — not *Pullman*, see ¶ [13], not *Burford*, see ¶¶ [14]-[15], and not *Younger*, see ¶ [16]. For unusual reasons, however, the Court held that the federal courts should abstain anyway.

3. According to Justice Brennan, one of the justifications for abstention in this case lay in the desire to avoid "piecemeal litigation" of water claims. ¶ [19]. Would litigation in state court be any less "piecemeal"? Consider how Colorado allocated water. As Justice Brennan notes, Colorado allocates water according to the "doctrine of prior appropriation," whereby one establishes a claim to a particular volume of water (usually measured in "acre-feet") by diverting it to a beneficial use and continuing to do so. See ¶ [4].

Now ask yourself about the nature of the federal claims. Did the United States rely on the doctrine of prior appropriation to support its claims? See ¶ [5] (referring to the "reserved rights of the United States [that] extend to Indian reservations and other federal lands, such as national parks and forests"). As Justice Stewart notes in his dissent, the federal claims are "wholly dissimilar to normal state water claims, because they are not based on actual beneficial use of water but rather on an intention formed at the time the federal land use was established to reserve a certain amount of water to support the federal reservations." See ¶ [25]. If this is so, how could a state judge adjudicating both federal and state claims to water avoid "piecemeal" litigation? Also, what would the two halves of the bifurcated proceedings have in common? Ask yourself what kind of evidence would be competent to establish a claim to water under the doctrine of prior appropriation. Now ask yourself what kind of evidence would be competent to establish the United States' claims. Is Justice Stewart right?

4. Note the rule, recognized by both the majority and the dissent, that, where a court is proceeding *in rem* and has therefore has functional custody of the *res* (as if it were locked in the courthouse safe), a parallel action *in rem* with respect to the same *res* is precluded. See ¶ [18] (Brennan, J., for the Court); ¶ [23] (Stewart, J., dissenting). This arises from a theoretical understanding of the concept of *in rem* jurisdiction, whereby, if one court asserts jurisdiction *in rem* over a particular "thing" (*res*), no other court could possibly assert similar jurisdiction over the same thing.

5. In *Quakenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), the Court gave a fair degree of coherence to its various doctrines of abstention. *Quackenbush* involved a decision by a federal judge to abstain as per *Burford* in an action *at law*. Emphasizing the close relation between abstention and equitable discretion, the Court held that the court should not have done so. As Justice O'Connor observed:

> Our longstanding application of these [abstention] doctrines reflects "the common-law background against which the statutes conferring jurisdiction were

enacted," *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). And, as the [court of appeals] correctly indicated, it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it "is asked to employ its historic powers as a court of equity," *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 120 (1981) (Brennan, J., concurring). This tradition informs our understanding of the jurisdiction Congress has conferred upon the federal courts, and explains the development of our abstention doctrines. . . . .

Though we have thus located the power to abstain in the historic discretion exercised by federal courts "sitting in equity," we have not treated abstention as a "technical rule of equity procedure." Rather, we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief. Accordingly, we have not limited the application of the abstention doctrines to suits for injunctive relief, but have also required federal courts to decline to exercise jurisdiction over certain classes of declaratory judgments, see, *e.g.*, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 297 (1943) (federal court must abstain from hearing declaratory judgment action challenging constitutionality of a state tax); *Samuels v. Mackell*, 401 U.S. 66, 69-70, 72-73 (1971) (extending *Younger* abstention to declaratory judgment actions), the granting of which is generally committed to the courts' discretion, see *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (federal courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites").

Nevertheless, we have not previously addressed whether the principles underlying our abstention cases would support the remand or dismissal of a common-law action for damages. . . . .

[For the most part,] we have applied abstention principles to actions "at law" only to permit a federal court to enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether. . . . .

[Justice O'Connor then discussed a variety of cases, concluding with a discussion of *Burford* and its progeny.]

These cases do not provide a formulaic test for determining when dismissal under *Burford* is appropriate, but they do demonstrate that the power to dismiss under the *Burford* doctrine, as with other abstention doctrines, derives from the discretion historically enjoyed by courts of equity. . . . [The] balance only rarely favors abstention, and the power to dismiss recognized in *Burford* represents an "'extraordinary and narrow exception to the duty of the District

> Court to adjudicate a controversy properly before it.'" *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)).

The Court then applied its analysis to the case at hand:

> To the extent the [court of appeals] held only that a federal court cannot, under *Burford*, dismiss or remand an action when the relief sought is not discretionary, its judgment is consistent with our abstention cases. We have explained the power to dismiss or remand a case under the abstention doctrines in terms of the discretion federal courts have traditionally exercised in deciding whether to provide equitable or discretionary relief, and [Quackenbush] appears to have conceded that the relief being sought in this case is neither equitable nor otherwise committed to the discretion of the court. In those cases in which we have applied traditional abstention principles to damages actions, we have only permitted a federal court to "withhold action until the state proceedings have concluded" *Growe v. Emison*, 507 U.S. 25, 32 (1993); that is, we have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether.

Note that Justice O'Connor described declaratory judgments as a discretionary form of relief, citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). This arises from the presence of the word "may" in the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) (emphasis added):

> In a case of actual controversy within its jurisdiction[,] any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal courts in the Sixth Circuit use a non-exhaustive list of five factors to decide whether declaratory relief is appropriate. These include:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Grand Trunk W. R.R. v. Consolidated Rail Co., 746 F.2d 323, 326 (6th Cir. 1984).

6. The Sixth Circuit uses a non-exhaustive eight-factor test derived from *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), to determine if abstention under *Colorado River* is appropriate. These include: (1) whether the state court has taken jurisdiction over property; (2) the relative convenience of the forums; (3) the interest in avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) the source of governing law; (6) whether the state court can adequately protect the federal plaintiff's interests; (7) the progress of the state-court proceedings; and (8) the presence or absence of concurrent jurisdiction. See *Romine v. Compuserve Inc.*, 160 F.3d 337, 340-41 (6th Cir. 1998). Application of this test is preceded by an analysis of whether the state and federal actions are parallel enough to implicate *Colorado River*. The rule in the Sixth Circuit is that the two proceedings need not be perfectly parallel. In *Romine*, for example, the Sixth Circuit applied *Colorado River* where the parties were "substantially similar" and the claims in the two cases were "predicated on the same allegations as to the same material facts." 160 F.3d at 340.

[31] **Toucey v. New York Life Insurance Co.**
314 U.S. 118 (1941)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

[1] These cases were argued in succession and are dealt with in a single opinion because the controlling question in both is the same: Does a federal court have power to stay a proceeding in a state court simply because the claim in controversy has previously been adjudicated in the federal court?

[2] *No. 16.* In 1935, Toucey brought suit against the New York Life Insurance Company in a Missouri state court. He alleged that in 1924 the company issued him a life insurance policy providing for monthly disability benefits and for the waiver of premiums during disability; that he became disabled in April, 1933, and that the defendant fraudulently concealed the disability provisions from him; that the defendant unlawfully cancelled the policy for nonpayment of premiums; that in September, 1935, he discovered the existence of the disability provisions; that he then applied to the company for reinstatement of the policy and for the payment of disability benefits, and that the company refused.

[3] The suit was removed to the federal District Court for the Western District of Missouri, the plaintiff being a citizen of Missouri, the defendant a New York corporation, and the amount in controversy exceeding $3,000 [the jurisdictional prerequisite at the time]. All of the material allegations of the bill were denied. The district court dismissed the bill, finding that there was no fraud on the defendant's part and that the plaintiff was not disabled within the meaning of the policy. No appeal was taken.

[4] In 1937, an action at law was brought against the insurance company in the Missouri state court by one Shay, a resident of the District of Columbia. He alleged that he was Toucey's assignee and that Toucey's disability entitled him to judgment. It does not appear that the insurance company filed an answer or any other pleading. Instead, a 'supplemental bill' was filed in the Western District of Missouri, setting forth the history of the litigation between the parties, alleging that the assignment to Shay was made in order to avoid federal jurisdiction, and praying that Toucey be enjoined from bringing any suit for the purpose of readjudicating the issues settled by the federal decree and from further prosecuting the Shay suit.

[5] A preliminary injunction was granted and affirmed by the Circuit Court of Appeals for the Eighth Circuit. The court held that Toucey's claim in the prior suit rested upon proof of his disability, and that this issue, necessarily involved in the Shay proceeding, had been conclusively determined in the insurance company's favor. Section 265 of the Judicial Code [*i.e.*, the Anti-Injunction Act, now codified as amended at 28 U.S.C. § 2283,] was construed not to deprive a federal court of the power to enjoin state court proceedings where an injunction is 'necessary to preserve to litigants the fruits of, or to effectuate the lawful decrees of the federal courts." Certiorari was denied, and the injunction was made permanent. Toucey appealed and

the Circuit Court of Appeals again affirmed. In view of the importance of the questions presented, we granted certiorari. The decision below was affirmed by an equally divided Court, and the case is now before us on rehearing.

[Justice Frankfurter then described the companion case.]

[6] The courts below have thus decided that the previous federal judgments are *res judicata* in the state proceedings, and that therefore, notwithstanding the prohibitory provisions of § 265, the federal courts may use their injunctive powers to save the defendants in the state proceedings the inconvenience of pleading and proving *res judicata*.

[7] *First.* Section 265 — "a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy — to prevent needless friction between state and federal courts," *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8-9 (1939) — is derived from § 5 of the Act of March 2, 1793: ". . . . nor shall a writ of injunction be granted (by any court of the United States) to stay proceedings in any court of a state . . . ." In its present form, the provision reads as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

[8] The history of this provision in the Judiciary Act of 1793 is not fully known. We know that on December 31, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the Judiciary Act of 1789. The most serious question raised by Randolph concerned the arduousness of the circuit duties imposed on the Supreme Court justices. But the Report also suggested a number of amendments dealing with procedural matters. A section of the proposed bill submitted by him provided that "no injunction in equity shall be granted by a district court to a judgment at law of a State court." Randolph explained that this clause "will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts." The Report was considered by the House sitting as a Committee of the Whole, and then was referred to successive special committees for further consideration. No action was taken until after Chief Justice Jay and his associates wrote the President that their circuit-riding duties were too burdensome. In response to this complaint, which was transmitted to Congress, the Act of March 2, 1793, was passed, containing in § 5, *inter alia*, the prohibition against staying state court proceedings.

[Justice Frankfurter then discussed various possible accounts for the origin of the Anti-Injunction Act, describing them as largely inconclusive.]

[9] Regardless of the various influences which shaped the enactment of § 5 of the Act of March 2, 1793, the purpose and direction underlying the provision is manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court.

[10] *Second.* The language of the Act of 1793 was unqualified: ". . . . nor shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." In the course of one hundred and fifty years, Congress has made few withdrawals from this sweeping prohibition:

[11] (1) *Bankruptcy proceedings.* This is the only legislative exception which has been incorporated directly into Section 265: ". . . . except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This provision, based upon § 21 of the Bankruptcy Act of 1867, was inserted in the Act of 1793 by the Revisors.

[12] (2) *Removal of actions.* The Removal Acts, ever since the Act of September 24, 1789, have provided that whenever any party entitled to remove a suit shall file with the state court a proper petition for removal and a bond with good and sufficient surety, it shall then be the duty of the state court to accept such petition and bond "and proceed no further in the cause." Section 265 has always been deemed inapplicable to removal proceedings. The true rationale of these decisions is that the Removal Acts qualify *pro tanto* the Act of 1793. . . . .

[13] (3) *Limitation of shipowners' liability.* The Act of 1851 limiting the liability of shipowners provides that after a shipowner transfers his interest in the vessel to a trustee for the benefit of the claimants, "all claims and proceedings against the owner or owners shall cease." Being a "subsequent statute" to the Act of 1793, this provision operates as an implied legislative amendment to it.

[14] (4) *Interpleader.* The Interpleader Act of 1926 amended the 1917 Interpleader Act to provide as follows: "Notwithstanding any provision of the Judicial Code to the contrary, said (district) court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court . . . ."

[15] (5) *Frazier-Lemke Act.* The filing of a petition for relief under this Act subjects the farmer and his property, wherever located, to the "exclusive jurisdiction" of the federal court. And except with the consent of the court, specified proceedings against the farmer or his property "shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court . . . ."

[16] *Third.* This brings us to applications of § 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400 (1836), holds that

the court, whether federal or state, which first takes possession of a *res* withdraws the property from the reach of the other. See *Kline v. Burke Construction Co.*, 260 U.S. 226, 235 (1922):

> The rank and authority of the (federal and state) courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.

[17] The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the *res* cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems over the same physical property would give rise to actual physical friction. The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court. And where a state court first acquires control of the *res*, the federal courts are disabled from exercising any power over it, by injunction or otherwise.

[18] Another group of cases is said to constitute an exception to § 265, namely, where federal courts have enjoined litigants from enforcing judgments fraudulently obtained in the state courts. [Justice Frankfurter then discussed cases in this vein, emphasizing that they are not entirely in agreement.] The foundation of these cases is thus very doubtful. However, we need not undertake to re-examine them here since, in any event, they do not govern the cases at bar.

[19] *Fourth.* We come, then, to the so-called "relitigation" cases [which Justice Frankfurter later described as "few," "recent" and "episodic"]

[20] *Fifth.* We find, therefore, that apart from Congressional authorization, only one "exception" has been imbedded in § 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into § 265 is no justification for making another. Furthermore, the *res* exception, having its roots in the same policy from which sprang § 265, has had an uninterrupted and firmly established acceptance in the decisions. The rule of the *res* cases was unequivocally on the books when Congress reenacted the original § 5 of the Act of 1793, first by the Revised Statutes of 1874 and later by the Judicial Code in 1911.

[21] In striking contrast are the "relitigation cases." Loose language and a sporadic, ill-considered decision cannot be held to have imbedded in our law a doctrine which so patently violates the expressed prohibition of Congress. We are not dealing here with a settled course of

decisions, erroneous in origin but around which substantial interests have clustered. Only a few recent and episodic utterances furnish a tenuous basis for the exception which we are now asked explicitly to sanction. Whatever justification there may be for turning past error into law when reasonable expectations would thereby be defeated, no such justification can be urged on behalf of a procedural doctrine in the distribution of judicial power between federal and state courts. It denies reality to suggest that litigants have shaped their conduct in reliance upon some loose talk in past decisions in the application of § 265 or, more concretely, upon erroneous implications drawn from [the decisions Justice Frankfurter had previously discussed].

[22] It is indulging in the merest fiction to suggest that the doctrine which for the first time we are asked to pronounce with our eyes open and in the light of full consideration, was so obviously and firmly part of the texture of our law that Congress in effect enacted it through its silence. There is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circumstances are such that Congress would ordinarily be expected to act. The provisions of § 265 have never been the subject of comprehensive legislative reexamination. Even the exceptions referable to legislation have been incidental features of other statutory schemes, such as the Removal and Interpleader Acts. The explicit and comprehensive policy of the Act of 1793 has been left intact. To find significance in Congressional nonaction under these circumstances is to find significance where there is none.

[23] Section 265 is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts. As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the "inferior courts" in their relation to the courts of the states. The unitary system of the courts of England is saved these problems.

* * *

[24] We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of No. 19.

[The dissenting opinion of Justice Reed, joined by Chief Justice Stone and Justice Roberts is omitted.]

Notes on Toucey

1. Hostility to *Toucey* was sufficiently strong that Congress amended the Anti-Injunction Act in 1948 to provide an express relitigation. The statute presently reads as follows (emphasis added): "A court of the United States may not grant an injunction to stay proceedings

in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, *or to protect or effectuate its judgments.*"

2. Despite his apparent unwillingness to read unwritten exceptions into the Anti-Injunction Act, Justice Frankfurter himself read such an exception into the act in *Leiter Minerals Inc. v. United States*, 352 U.S. 220 (1957), in cases in which the United States goes into federal court to protect its own interests and seeks to terminate parallel proceedings in state court.

3. Similarly, in *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1970), the Court allowed the National Labor Relations Board to obtain an injunction in federal court against reliance on a *state-court* injunction where's the Board's ability to resolve a labor dispute was at issue. Writing for the Court, Justice Douglas was decidedly vague about the predicate for this exception to the Anti-Injunction Act:

> The action in the instant case does not seek an injunction to restrain specific activities upon which the Board has issued a complaint but is based upon the general doctrine of pre-emption. We therefore do not believe this case falls within the narrow exception contained in § 2283 for matters "necessary in aid of [a federal court's] jurisdiction." There is in the Act no express authority for the Board to seek injunctive relief against pre-empted state action [which would preclude reliance upon the first exception to the Anti-Injunction]. The question remains whether there is implied authority to do so.
>
> It has log been held that the Board, though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes of the Act. [Justice Douglas then discussed cases.]
>
> We conclude that there is also an implied authority of the Board, in spite of the command of § 2283, to enjoin state action where its federal power pre-empts the field.

Nash-Finch, 404 U.S. at 142, 144. In justifying this conclusion, Justice Douglas relied quite heavily on *Leiter Minerals*. See *Nash-Finch*, 404 U.S. at 144-46. Arguably, the real question presented in the next case, *Atlantic Coast Line*, was whether the Court would continue to pursue a latitudinarian approach to the Anti-Injunction Act, or whether it would hew closer to the line of *Toucey*.

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers
398 U.S. 281 (1970)

MR. JUSTICE BLACK delivered the opinion of the Court.

[1] Congress in 1793, shortly after the American Colonies became one united Nation, provided that, in federal courts "a writ of injunction [shall not] be granted to stay proceedings in any court of a state." Act of March 2, 1793. Although certain exceptions to this general prohibition have been added, that statute, directing that state courts shall remain free from interference by federal courts, has remained in effect until this time. Today that amended statute provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. Despite the existence of this longstanding prohibition, in this case a federal court did enjoin the petitioner, Atlantic Coast Line Railroad Co., from invoking an injunction issued by a Florida state court which prohibited certain picketing by respondent Brotherhood of Locomotive Engineers. The case arose in the following way.

[2] In 1967, BLE began picketing the Moncrief Yard, a switching yard located near Jacksonville, Florida, and wholly owned and operated by ACL.[2] As soon as this picketing began ACL went into federal court seeking an injunction. When the federal judge denied the request, ACL immediately went into state court, and there succeeded in obtaining an injunction. No further legal action was taken in this dispute until two years later, in 1969, after this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). In that case, the Court considered the validity of a state injunction against picketing by the BLE and other unions at the Jacksonville Terminal, located immediately next to Moncrief Yard. The Court reviewed the factual situation surrounding the Jacksonville Terminal picketing and concluded that the unions had a federally protected right to picket under the Railway Labor Act, and that that right could not be interfered with by state court injunctions.

[3] [Editor's new paragraph.] Immediately after a petition for rehearing was denied in that case, the respondent BLE filed a motion in state court to dissolve the Moncrief Yard

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[2]There is no present labor dispute between the ACL and the BLE or any other ACL employees. ACL became involved in this case as a result of a labor dispute between the Florida East Coast Railway Co. and its employees. FEC cars are hauled into and out of Moncrief Yard and switched around to make up trains in that yard. The BLE picketed the yard, encouraging ACL employees not to handle any FEC cars.

* * *

injunction, arguing that, under the *Jacksonville Terminal* decision the injunction was improper. The state judge refused to dissolve the injunction, holding that this Court's *Jacksonville Terminal* decision was not controlling. The union did not elect to appeal that decision directly, but instead went back into the federal court and requested an injunction against the enforcement of the state court injunction. The District Judge granted the injunction and upon application a stay of that injunction, pending the filing and disposition of a petition for certiorari, was granted. The Court of Appeals summarily affirmed on the parties' stipulation, and we granted a petition for certiorari to consider the validity of the federal court's injunction against the state court.

[4] In this Court, the union contends that the federal injunction was proper either "to protect or effectuate" the District Court's denial of an injunction in 1967, or as "necessary in aid of" the District Court's jurisdiction. Although the questions are by no means simple and clear, and the decision is difficult, we conclude that the injunction against the state court was not justified under either of these two exceptions to the anti-injunction statute. We therefore hold that the federal injunction in this case was improper.

I

[5] Before analyzing the specific legal arguments advanced in this case, we think it would be helpful to discuss the background and policy that led Congress to pass the anti-injunction statute in 1793. While all the reasons that led Congress to adopt this restriction on federal courts are not wholly clear, it is certainly likely that one reason stemmed from the essentially federal nature of our national government. When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by "the supreme Law of the Land" as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies. Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights. Others felt that a complete system of federal courts to take care of federal legal problems should be provided for in the Constitution itself. This dispute resulted in compromise. One "supreme Court" was created by the Constitution, and Congress was given the power to create other federal courts. In the first Congress, this power was exercised and a system of federal trial and appellate courts with limited jurisdiction was created by the Judiciary Act of 1789.

[6] While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus, from the beginning, we have had in this country two essentially separate legal systems. Each system proceeds independently of the other, with ultimate review in this Court of the federal questions raised in either system. Understandably, this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of

more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," it was necessary to work out lines of demarcation between the two systems. Some of these limits were spelled out in the 1789 Act. Others have been added by later statutes, as well as judicial decisions. The 1793 anti-injunction Act was, at least in part, a response to these pressures.

[7] On its face, the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that, in certain circumstances, a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions.

[8] We cannot accept any such contention. In 1955, when this Court interpreted this statute, it stated:

> This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 515-16 (1955). Since that time, Congress has not seen fit to amend the statute, and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover, since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

II

[9] In this case, the Florida Circuit Court enjoined the union's intended picketing, and the United States District Court enjoined the railroad "from giving effect to or availing [itself] of the benefits of" that state court order. Both sides agree that, although this federal injunction is, in terms, directed only at the railroad, it is an injunction "to stay proceedings in a State court." It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding. Thus, if the injunction against the Florida court proceedings is to be upheld, it must be "expressly authorized by Act of

Congress," "necessary in aid of [the District Court's] jurisdiction," or "to protect or effectuate [that court's] judgments."

[10] Neither party argues that there is any express congressional authorization for injunctions in this situation, and we agree with that conclusion. The respondent union does contend that the injunction was proper either as a means to protect or effectuate the District Court's 1967 order or in aid of that court's jurisdiction. We do not think that either alleged basis can be supported.

A

[11] The argument based on protecting the 1967 order is not clearly expressed, but, in essence, it appears to run as follows: in 1967, the railroad sought a temporary restraining order which the union opposed. In the course of deciding that request, the United States District Court determined that the union had a federally protected right to picket Moncrief Yard, and that this right could not be interfered with by state courts. When the Florida Circuit Court enjoined the picketing, the United States District Court could, in order to protect and effectuate its prior determination, enjoin enforcement of the state court injunction. Although the record on this point is not unambiguously clear, we conclude that no such interpretation of the 1967 order can be supported.

[12] When the railroad initiated the federal suit, it filed a complaint with three counts, each based entirely on alleged violations of federal law. The first two counts alleged violations of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the third alleged a violation of that Act and the Interstate Commerce Act as well. Each of the counts concluded with a prayer for an injunction against the picketing. Although the union had not been formally served with the complaint and had not filed an answer, it appeared at a hearing on a motion for a temporary restraining order and argued against the issuance of such an order. The union argued that it was a party to a labor dispute with the FEC, that it had exhausted the administrative remedies required by the Railway Labor Act, and that it was thus free to engage in "self-help," or concerted economic activity. Then the union argued that such activity could not be enjoined by the federal court. In an attempt to clarify the basis of this argument, the District Judge asked: "You are basing your case solely on the Norris-LaGuardia Act?" The union's lawyer replied: "Right. I think, at this point of the argument, since Norris-LaGuardia is clearly in point here." At no point during the entire argument did either side refer to state law, the effects of that law on the picketing, or the possible preclusion of state remedies as a result of overriding federal law. The next day, the District Court entered an order denying the requested restraining order. In relevant part, that order included these conclusions of law:

> 3. The parties to the BLE-FEC "major dispute," having exhausted the procedures of the Railway Labor Act, are now free to engage in self-help. . . . .

4. The conduct of the FEC pickets and that of the responding ACL employees are a part of the FEC-BLE major dispute. . . . .

7. The Norris-LaGuardia Act, 29 U.S.C. § 101, and the Clayton Act, 29 U.S.C. § 52, are applicable to the conduct of the defendants here involved.

[13] In this Court, the union asserts that the determination that it was "free to engage in self-help" was a determination that it had a federally protected right to picket, and that state law could not be invoked to negate that right. The railroad, on the other hand, argues that the order merely determined that the *federal* court could not enjoin the picketing, in large part because of the general prohibition in the Norris-LaGuardia Act against issuance by federal courts of injunctions in labor disputes. Based solely on the state of the record when the order was entered, we are inclined to believe that the District Court did not determine whether federal law precluded an injunction based on state law. Not only was that point never argued to the court, but there is no language in the order that necessarily implies any decision on that question. In short, we feel that the District Court, in 1967, determined that federal law could not be invoked to enjoin the picketing at Moncrief Yard, and that the union did have a right "to engage in self-help" as far as the federal courts were concerned. But that decision is entirely different from a decision that the Railway Labor Act precludes state regulation of the picketing as well, and this latter decision is an essential prerequisite for upholding the 1969 injunction as necessary "to protect or effectuate" the 1967 order. Finally we think it highly unlikely that the brief statements in the order conceal a determination of a disputed legal point that later was to divide this Court in a 4-to-3 vote in *Jacksonville Terminal* in opinions totaling 28 pages. While judicial writing may sometimes be thought cryptic and tightly packed, the union's contention here stretches the content of the words well beyond the limits of reasonableness.

* * *

[14] This record, we think, conclusively shows that neither the parties themselves nor the District Court construed the 1967 order as the union now contends it should be construed. Rather, we are convinced that the union, in effect, tried to get the Federal District Court to decide that the state court judge was wrong in distinguishing the *Jacksonville Terminal* decision.[5] Such an attempt to seek appellate review of a state decision in the Federal District Court cannot be justified as necessary "to protect or effectuate" the 1967 order. The record simply will not support the union's contention on this point.

B

[5]For purposes of this case only, we will assume, without deciding, that the Florida Circuit Court's decision was wrong in light of our decision in *Jacksonville Terminal*. [Footnote moved by editor.]

[15] This brings us to the second prong of the union's argument, in which it is suggested that, even if the 1967 order did not determine the union's right to picket free from state interference, once the decision in *Jacksonville Terminal* was announced, the District Court was then free to enjoin the state court on the theory that such action was "necessary in aid of [the District Court's] jurisdiction." Again the argument is somewhat unclear, but it appears to go in this way: the District Court had acquired jurisdiction over the labor controversy in 1967, when the railroad filed its complaint, and it determined at that time that it did have jurisdiction. The dispute involved the legality of picketing by the union, and the *Jacksonville Terminal* decision clearly indicated that such activity was not only legal, but was protected from state court interference. The state court had interfered with that right, and thus a federal injunction was "necessary in aid of its jurisdiction." For several reasons, we cannot accept the contention.

[16] First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be "necessary in aid of" that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.

[17] [Editor's new paragraph.] [No] such situation is presented here. Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense, as well. While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts. Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. *Cf. England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts. Therefore, the state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction necessary to aid that jurisdiction.

[18] [Editor's new paragraph.] Nor was an injunction necessary because the state court may have taken action which the federal court was certain was improper under the *Jacksonville*

Terminal decision. Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts, and ultimately, if necessary, in this Court. Similarly if, because of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly, in certain emergency circumstances, seek such relief from this Court as well. Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

III

[19] This case is by no means an easy one. The arguments in support of the union's contentions are not insubstantial. But whatever doubts we may have are strongly affected by the general prohibition of § 2283.

[24] Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

[21] The injunction issued by the District Court must be vacated. Since that court has not yet proceeded to a final judgment in the case, the cause is remanded to it for further proceedings in conformity with this opinion.

It is so ordered.

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

MR. JUSTICE HARLAN, concurring.

[22] I join the Court's opinion on the understanding that its holding implies no retreat from *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Whether or not that case controls the underlying controversy here is a question that will arise only on review of any final judgment entered in the state court proceedings respecting that controversy.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, dissenting.

[23] My disagreement with the Court in this case is a relatively narrow one. I do not disagree with much that is said concerning the history and policies underlying 28 U.S.C. § 2283.

Nor do I dispute the Court's holding . . . that federal courts do not have authority to enjoin state proceedings merely because it is asserted that the state court is improperly asserting jurisdiction in an area preempted by federal law or federal procedures. Nevertheless, in my view, the District Court had discretion to enjoin the state proceedings in the present case because it acted pursuant to an explicit exception to the prohibition of § 2283, that is, "to protect or effectuate [the District Court's] judgments."

[24] The pertinent portions of the District Court's 1967 order, denying ACL's application for injunctive relief and defining BLE's federally protected right to picket at the Moncrief Yard, are as follows:

> 3. The parties to the BLE-FEC "major dispute," having exhausted the procedures of the Railway Labor Act, are now free to engage in self-help.
>
> 4. The conduct of the FEC pickets and that of the responding ACL employees are a part of the FEC-BLE major dispute.
>
> * * *
>
> 6. The "economic self-interest" of the picketing union in putting a stop to the interchange services daily performed within the premises of plaintiff's yard facilities, and in the normal, day-to-day operation of FEC trains operating with strike replacement crews within these facilities is present here. The "economic self-interest" of the responding employees in refusing to handle this interchange and in making common cause with the striking FEC engineers is similarly present.
>
> 7. The Norris-LaGuardia Act, 29 U.S.C. § 101, and the Clayton Act, 29 U.S.C. § 52, are applicable to the conduct of the defendants here involved.

[25] The thrust of the District Judge's order is that the procedures prescribed by the Railway Labor Act had been exhausted in relation to the BLE-FEC dispute, that BLE was therefore free to engage in self-help tactics, and that it was properly exercising this federal right when it engaged in the picketing that ACL sought to enjoin. This interpretation of the order is supported by the fact that the District Judge relied upon *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963), in which this Court held that the parties had exhausted all available procedures under the Railway Labor Act and thus were free to resort to self-help. Furthermore, the District Court invoked § 20 of the Clayton Act, 29 U.S.C. § 52, which provides that certain union activities, including striking and peaceful picketing, shall not "be considered or held to be violations of any law of the United States." Thus, contrary to petitioner's contention, the District Court obviously decided considerably more than the threshold question of whether the Norris-LaGuardia Act withdrew jurisdiction to grant federal injunctive relief in the circumstances of this case.

[26] In my view, what the District Court decided in 1967 was that BLE had a federally protected right to picket at the Moncrief Yard and, by necessary implication, that this right could not be subverted by resort to state proceedings. I find it difficult indeed to ascribe to the District Judge the views that the Court now says he held, namely, that ACL, merely by marching across the street to the state court, could render wholly nugatory the District Judge's declaration that BLE had a federally protected right to strike at the Moncrief Yard.

[27] Moreover, it is readily apparent from the District Court's 1969 order enjoining the state proceedings that the District Judge viewed his 1967 order as delineating the rights of the respective parties, and, more particularly, as establishing BLE's right to conduct the picketing in question under paramount federal law. This interpretation should be accepted as controlling, for certainly the District Judge is in the best position to render an authoritative interpretation of his own order. . . . .

* * *

[28] . . . . Unquestionably § 2283 manifests a general design on the part of Congress that federal courts not precipitately interfere with the orderly determination of controversies in state proceedings. However, this policy of nonintervention is by no means absolute, as the explicit exceptions in § 2283 make entirely clear. Thus, § 2283 itself evinces a congressional intent that resort to state proceedings not be permitted to undermine a prior judgment of a federal court. But that is exactly what has occurred in the present case. Indeed, the federal determination that BLE may picket at the Moncrief Yard has been rendered wholly ineffective by the state injunction. The crippling restrictions that the Court today places upon the power of the District Court to effectuate and protect its orders are totally inconsistent with both the plain language of § 2283 and the policies underlying that statutory provision.

[29] Accordingly, I would affirm the judgment of the Court of Appeals sustaining the District Court's grant of injunctive relief against petitioner's giving effect to, or availing itself of, the benefit of the state court injunction.

Notes on Atlantic Coast Line

As you can see, Justice Black took a strict approach to the Anti-Injunction Act in *Atlantic Coast Line*, rejecting the latitudinarianism of *Leiter Minerals* and *Nash-Finch*. In particular, he more or less limited the exception for injunctions "where necessary in aid of . . . jurisdiction" to something like the exception for parallel proceedings *in rem* — situations where an injunction is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair [its] flexibility and authority to decide that case." ¶ [16]. He also refused to uphold the federal court's 1969 injunction as "necessary . . . to protect or effectuate" its judgment of 1967, after concluding that the judge was referring only to the procedural restraints of Norris-LaGuardia, not to the substantive provisions of the Railway Labor Act, when he said in 1967 that the unions "were free to engage in self-help." See ¶ [13].

[32] **Mitchum v. Foster**
407 U.S. 225 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

[1] The federal anti-injunction statute provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." An Act of Congress, 42 U.S.C. § 1983, expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges, or immunities secured by the Constitution . . . ." The question before us is whether this "Act of Congress" comes within the "expressly authorized" exception of the anti-injunction statute so as to permit a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a state court. This question, which has divided the federal courts, has lurked in the background of many of our recent cases, but we have not until today explicitly decided it.

I

[2] The prosecuting attorney of Bay County, Florida, brought a proceeding in a Florida court to close down the appellant's bookstore as a public nuisance under the claimed authority of Florida law. The state court entered a preliminary order prohibiting continued operation of the bookstore. After further inconclusive proceedings in the state courts, the appellant filed a complaint in the United States District Court for the Northern District of Florida, alleging that the actions of the state judicial and law enforcement officials were depriving him of rights protected by the First and Fourteenth Amendments. Relying upon 42 U.S.C. § 1983, he asked for injunctive and declaratory relief against the state court proceedings, on the ground that Florida laws were being unconstitutionally applied by the state court so as to cause him great and irreparable harm. A single federal district judge issued temporary restraining orders, and a three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. After a hearing, the three-judge court dissolved the temporary restraining orders and refused to enjoin the state court proceeding, holding that the "injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this court's jurisdiction, and it is not sought in order to protect or effectuate any judgment of this court." An appeal was brought directly here under 28 U.S.C. § 1253, and we noted probable jurisdiction.

II

[3] In denying injunctive relief, the District Court relied on this Court's decision in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). The *Atlantic Coast Line* case did not deal with the "expressly authorized" exception of the anti-injunction statute, but the Court's opinion in that case does bring into sharp focus the critical importance of the question now before us. For in that case we expressly rejected the view that

the anti-injunction statute merely states a flexible doctrine of comity, and made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions:

> On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention . . . . [We] hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to 2283 if it is to be upheld . . . .

398 U.S. at 286-87.

[4] It follows, in the present context, that if 42 U.S.C. § 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then a federal equity court is wholly without power to grant any relief in a § 1983 suit seeking to stay a state court proceeding. In short, if a § 1983 action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be.

[5] Last Term, in *Younger v. Harris*, 401 U.S. 37 (1971), and its companion cases, the Court dealt at length with the subject of federal judicial intervention in pending state criminal prosecutions. In *Younger* a three-judge federal district court in a § 1983 action had enjoined a criminal prosecution pending in a California court. In asking us to reverse that judgment, the appellant argued that the injunction was in violation of the federal anti-injunction statute. But the Court carefully eschewed any reliance on the statute in reversing the judgment, basing its decision instead upon what the Court called "Our Federalism" — upon "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41, 44.

[6] In *Younger*, this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U.S. at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S. at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances — where irreparable injury is "both great and immediate," 401 U.S. at 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S. at 53, or where there is a showing of "bad faith, harassment, or . . . other

unusual circumstances that would call for equitable relief." 401 U.S. at 54. In the companion case of *Perez v. Ledesma*, 401 U.S. 82, 85 (1971), the Court said that "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

[7] While the Court in *Younger* and its companion cases expressly disavowed deciding the question now before us — whether § 1983 comes within the "expressly authorized" exception of the anti-injunction statute — it is evident that our decisions in those cases cannot be disregarded in deciding this question. In the first place, if § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger*, as the appellant in that case argued, and there would have been no occasion whatever for the Court to decide that case upon the "policy" ground of "Our Federalism." Secondly, if § 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then we must overrule *Younger* and its companion cases insofar as they recognized the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of *Atlantic Coast Line*, the anti-injunction statute would, in a § 1983 case, then be an "absolute prohibition" against federal equity intervention in a pending state criminal or civil proceeding — under any circumstances whatever.

[8] The *Atlantic Coast Line* and *Younger* cases thus serve to delineate both the importance and the finality of the question now before us. And it is in the shadow of those cases that the question must be decided.

III

[9] The anti-injunction statute goes back almost to the beginnings of our history as a Nation. In 1793, Congress enacted a law providing that no "writ of injunction be granted [by any federal court] to stay proceedings in any court of a state . . . ." Act of March 2, 1793. The precise origins of the legislation are shrouded in obscurity, but the consistent understanding has been that its basic purpose is to prevent "needless friction between state and federal courts." *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 9 (1940). The law remained unchanged until 1874, when it was amended to permit a federal court to stay state court proceedings that interfered with the administration of a federal bankruptcy proceeding. The present wording of the legislation was adopted with the enactment of Title 28 of the United States Code in 1948.

[10] Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, the Court soon recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope. So it was that, in addition to the bankruptcy law exception that Congress explicitly recognized in 1874, the Court through the years found that federal courts were empowered to enjoin state court proceedings, despite the anti-injunction statute, in carrying out the will of Congress under at least six other federal laws. These covered a broad spectrum of congressional action: (1) legislation

providing for removal of litigation from state to federal courts,[12] (2) legislation limiting the liability of shipowners,[13] (3) legislation providing for federal interpleader actions,[14] (4) legislation conferring federal jurisdiction over farm mortgages,[15] (5) legislation governing federal habeas corpus proceedings,[16] and (6) legislation providing for control of prices.[17]

[11] In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute. One was an "*in rem*" exception, allowing a federal court to enjoin a state court proceeding in order to protect its jurisdiction of a *res* over which it had first acquired jurisdiction. Another was a "relitigation" exception, permitting a federal court to enjoin relitigation in a state court of issues already decided in federal litigation. Still a third exception, more recently developed, permits a federal injunction of state court proceedings when

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[12]The federal removal provisions, both civil and criminal, provide that once a copy of the removal petition is filed with the clerk of the state court, the "State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(e).

[13]The Act of 1851, as amended, provides that once a shipowner has deposited with the court an amount equal to the value of his interest in the ship, "all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U.S.C. § 185.

[14]The Interpleader Act of 1926 as currently written provides that in "any civil action of interpleader . . . a district court may . . . enter its order restraining [all claimants] . . . from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action." 28 U.S.C. § 2361.

[15]The Frazier-Lemke Farm-Mortgage Act, as amended in 1935, provides that in situations to which it is applicable a federal court shall "stay all judicial or official proceedings in any court." 11 U.S.C. § 203(s)(2) (1940 ed.).

[16]The Federal Habeas Corpus Act provides that a federal court before which a habeas corpus proceeding is pending may "stay any proceeding against the person detained in any State Court . . . for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251.

[17]Section 205(a) of the Emergency Price Control Act of 1942 provided that the Price Administrator could request a federal district court to enjoin acts that violated or threatened to violate the Act. In *Porter v. Dicken*, 328 U.S. 252 (1946), we held that this authority was broad enough to justify an injunction to restrain state court proceedings. The Emergency Price Control Act was thus considered a congressionally authorized exception to the anti-injunction statute. Section 205(a) expired in 1947.

the plaintiff in the federal court is the United States itself, or a federal agency asserting "superior federal interests."[20]

[12] In *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, the Court in 1941 issued an opinion casting considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions. The Court's opinion expressly disavowed the "relitigation" exception to the statute, and emphasized generally the importance of recognizing the statute's basic directive "of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." 314 U.S. at 132. The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which, as the Reviser's Note makes evident, served not only to overrule the specific holding of *Toucey*, but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision."

[13] We proceed, then, upon the understanding that in determining whether § 1983 comes within the "expressly authorized" exception of the anti-injunction statute, the criteria to be applied are those reflected in the Court's decisions prior to *Toucey*. A review of those decisions makes reasonably clear what the relevant criteria are. In the first place, it is evident that, in order to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. As the Court has said, "no prescribed formula is required; an authorization need not expressly refer to § 2283." *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 516 (1955). Indeed, none of the previously recognized statutory exceptions contains any such reference. Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. Three of the six previously recognized statutory exceptions contain no such authorization. Thirdly, it is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.

[14] With these criteria in view, we turn to consideration of 42 U.S.C. § 1983.

IV

[15] Section 1983 was originally § 1 of the Civil Rights Act of 1871. It was "modeled" on § 2 of the Civil Rights Act of 1866, and was enacted for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." The predecessor of § 1983 was thus an important

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[20] *Leiter Minerals Inc. v. United States*, 352 U.S. 220 (1957); *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1970).

part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment.[28] As a result of the new structure of law that emerged in the post-Civil War era — and especially of the Fourteenth Amendment, which was its centerpiece — the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

[16] It is clear from the legislative debates surrounding passage of 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action[,] whether that action be executive, legislative, or *judicial*." *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

[17] As Representative Lowe stated, the "records of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to protect the rights, privileges and immunities of citizens . . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess., 374-76 (1871). This view was echoed by Senator Osborn: "If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate . . . . We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; *i.e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." *Id.* at 653. And Representative Perry concluded: "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were

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[28]In addition to proposing the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress, from 1866 to 1875 enacted the following civil rights legislation: Act of April 9, 1866, Act of May 31, 1870, Act of April 20, 1871, and Act of March 1, 1875. In 1875, Congress also passed the general federal-question provision, giving federal courts the power to hear suits arising under Art. III, § 2, of the Constitution. Act of March 3, 1875. This is the predecessor of 28 U.S.C. § 1331.

crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." *Id.* at App. 78.[31]

[18] Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. The debate was not about whether the predecessor of 1983 extended to actions of state courts, but whether this innovation was necessary or desirable.

[19] This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

V

[20] Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Ex parte Virginia*, 100 U.S. at 346. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U.S. 123 (1908). For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law.

[21] In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger v. Harris*, 401 U.S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it

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[31]Representative Coburn stated: "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily . . . ." Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

was absolutely without power in this § 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.

[22] The judgment is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join, concurring.

[23] I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds only that 28 U.S.C. § 2283, which is an absolute bar to injunctions against state court proceedings in most suits, does not apply to a suit brought under 42 U.S.C. § 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." In the context of pending state criminal proceedings, we held in *Younger v. Harris*, 401 U.S. 37 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case.

Parsons Steel, Inc. v. First Alabama Bank
474 U.S. 518 (1986)

JUSTICE REHNQUIST delivered the opinion of the Court.

[1] The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts as well as state courts to give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." The Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits a federal court from granting an injunction to stay proceedings in a state court, but excepts from that prohibition the issuance of an injunction by a federal court "where necessary . . . to protect or effectuate its judgments." In the present case the Court of Appeals for the Eleventh Circuit held that the quoted exception to the latter Act worked a *pro tanto* amendment to the former, so that a federal court might issue an injunction against

state-court proceedings even though the prevailing party in the federal suit had litigated in the state court and lost on the res judicata effect of the federal judgment. We granted certiorari to consider this question, and now reverse the judgment of the Court of Appeals.

[2] Petitioners Parsons Steel, Inc., and Jim and Melba Parsons sued respondents First Alabama Bank of Montgomery and Edward Herbert, a bank officer, in Alabama state court in February 1979, essentially alleging that the bank had fraudulently induced the Parsonses to permit a third person to take control of a subsidiary of Parsons Steel and eventually to obtain complete ownership of the subsidiary. The subsidiary was adjudicated an involuntary bankrupt in April 1979, and the trustee in bankruptcy was added as a party plaintiff in the state action. In May 1979 Parsons Steel and the Parsonses sued the bank in the United States District Court for the District of Alabama, alleging that the same conduct on the part of the bank that was the subject of the state-court suit also violated the Bank Holding Company Act amendments, 12 U.S.C. §§ 1971-1978. The trustee in bankruptcy chose not to participate in the federal action.

[3] The parties conducted joint discovery in the federal and state actions. The federal action proceeded to trial on the issue of liability before the state action went to trial. A jury returned a verdict in favor of petitioners, but the District Court granted judgment n.o.v. to the bank. That judgment was affirmed on appeal. After the federal judgment was entered, respondents pleaded in the state action the defenses of res judicata and collateral estoppel based on that judgment. The Alabama court, however, ruled that res judicata did not bar the state action. Almost a year after the federal judgment was entered, the state complaint was amended to include a Uniform Commercial Code claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable. A jury returned a general verdict in favor of petitioners, awarding a total of four million and one dollars in damages.

[4] Having lost in state court, respondents returned to the District Court that had previously entered judgment in the bank's favor and filed the present injunctive action against petitioners, the plaintiffs in the state action. The District Court found that the federal BHCA suit and the state action were based on the same factual allegations and claimed substantially the same damages. The court held that the state claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata. Determining that the Alabama judgment in effect nullified the earlier federal-court judgment in favor of the bank, the District Court enjoined petitioners from further prosecuting the state action.

[5] A divided panel of the Court of Appeals affirmed in relevant part, holding that the issuance of the injunction was not "an abuse of discretion" by the District Court. The majority first agreed with the District Court that the fraud and UCC claims presented issues of fact and law that could have been and should have been raised in the same action as the BHCA claim. Thus the parties to the BHCA action and their privies, including the trustee in bankruptcy, were barred by res judicata from raising these claims in state court after the entry of the federal judgment.

[6] The majority then held that the injunction was proper under the so-called "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or *to protect or effectuate its judgments*."

(Emphasis added.) In reaching this holding, the majority explicitly declined to consider the possible preclusive effect, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, of the state court's determination after full litigation by the parties that the earlier federal-court judgment did not bar the state action. According to the majority, "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action."

[7] Finally, the majority ruled that respondents had not waived their right to an injunction by waiting until after the trial in the state action was completed. The majority concluded that the state-court pleadings were so vague that it was not clear until after trial that essentially the same cause of action was involved as the BHCA claim and that the earlier federal judgment was in danger of being nullified. According to the majority, the Anti-Injunction Act does not limit the power of a federal court to protect its judgment "to specific points in time in state court trials or appellate procedure."

* * *

[8] In the instant case[,] the Court of Appeals did not consider the possible preclusive effect under Alabama law of the state-court judgment, and particularly of the state court's resolution of the res judicata issue, concluding instead that the relitigation exception to the Anti-Injunction Act limits the Full Faith and Credit Act. We do not agree. "[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). Here, as in *Kremer*, there is no claim of an express repeal; rather, the Court of Appeals found an implied repeal. "'It is of course, a cardinal principle of statutory construction that repeals by implication are not favored,' and whenever possible, statutes should be read consistently." 456 U.S. at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

[9] The contrary holding of the Court of Appeals apparently was based on the fact that Congress in 1948 amended the Anti-Injunction Act to overrule this Court's decision in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), in favor of the understanding of prior law expressed in Justice Reed's dissenting opinion. But the instant case is a far cry from *Toucey*, and one may fully accept the logic of Justice Reed's dissent without concluding that it sanctions the result reached by the Court of Appeals here. In each of the several cases involved in *Toucey*, the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court. In the instant case, on the other hand, respondents chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try.

[10] The Court of Appeals also felt that the District Court's injunction would discourage inefficient simultaneous litigation in state and federal courts on the same issue — that is, the res judicata effect of the prior federal judgment. But this is one of the costs of our dual court system:

> In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.

Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281, 295 (1970).

[11] Indeed, this case is similar to *Atlantic Coast Line*, in which we held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case. There we stated that the phrase "to protect or effectuate its judgments" authorized a federal injunction of state proceedings only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id.*

[12] We hold, therefore, that the Court of Appeals erred by refusing to consider the possible preclusive effect, under Alabama law, of the state-court judgment. Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.

[13] We think the District Court is best situated to determine and apply Alabama preclusion law in the first instance. Should the District Court conclude that the state-court judgment is not entitled to preclusive effect under Alabama law and the Full Faith and Credit

Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

[14] 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.

Notes on Parsons Steel

Do you understand what the Court held in this case? In effect, it held that the federal judge should have treated the state court's decision **on** *res judicata* **as** *res judicata*.

[33] **Convention on Ratification of the Constitution**
Philadelphia, Pennsylvania

Dec. 7, 1787

* * *

["The judicial Power shall extend . . . to Controversies between a State and Citizens of another State . . . ."]

MR. WILSON — When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.

Convention on Ratification of the Constitution
Richmond, Virginia

Tues., Jun. 10, 1788

* * *

[1] Mr. RANDOLPH — If you mean to have a general government at all, ought it not to be empowered to raise money to pay the debts, and advance the prosperity, of the United States, in the manner that Congress shall think most eligible? What is the consequence of the contrary? You give it power by one hand, and take it away from it by the other. If it be defective in some parts, yet we ought to give due credit to those parts which are acknowledged to be good. Does not the prohibition of paper money merit our approbation? I approve of it because it prohibits tender-laws, secures the widows and orphans, and prevents the states from impairing contracts. I admire that part which forces Virginia to pay her debts. If we recur to the bill of rights, which the honorable gentleman speaks so much of, we shall find that it recommends justice. Had not this power been given, my affection for it would not have been so great. When it obliges us to tread in the path of virtue, when it takes away from the most influential man the power of directing our passions to his own emolument, and of trampling upon justice, I hope to be excused when I say, that, were it more objectionable than it is, I should vote for the Union.

* * *

Fri., Jun. 20, 1788

* * *

[2] Mr. MADISON — [Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. It is a case which cannot often happen. . . . .

* * *

[3] Mr. HENRY — As to controversies between a state and the citizens of another state, [Mr. Madison's] construction of [the Constitution] is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary — that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it. What! is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? . . . .

* * *

[4] Mr. MARSHALL — With respect to disputes between a State, and the citizens of another State, [federal] jurisdiction has been decried with unusual vehemence. I hope that no Gentleman will think that a State will be called at the bar of the Federal Court. . . . . It is not rational to suppose, that the sovereign power should be dragged before a Court. The intent is, to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided.

* * *

Alexander Hamilton, Federalist No. 81
June 25 and 28, 1798

To the People of the State of New York:

* * *

[1] Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

[2] It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

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PUBLIUS.

Chisholm v. Georgia
2 U.S. (2 Dall.) 419 (1793)

[During the Revolution, Farquhar delivered goods to the State of Georgia, for which he was never adequately paid. Chisholm, the executor of his estate, brought an action for *assumpsit* [*i.e.*, breach of contract] against the state in federal court, which the state refused to defend. The custom at the time was for each member of an appellate court to announce his opinion in turn, with the Chief Justice speaking last. The Court as a whole, which at that time had five members, held for Chisholm.]

IREDELL, *Justice*. . . . .

* * *

[1] The action is an action of *assumpsit*. The particular question then before the Court, is, will an action of *assumpsit* lie against a State? This particular question (abstracted from the general one, viz., whether, a State can in any instance be sued?) I took the liberty to propose to the consideration of the attorney-general,[a] last term. I did so, because I have often found a great deal of confusion to arise from taking too large a view at once, and I had found myself embarrassed on this very subject, until I considered the abstract question itself. The attorney-general has spoken to it, in deference to my request[,] but he spoke to this particular question slightly, conceiving it to be involved in the general one; and after establishing, as he thought, that point, he seemed to consider the other followed of course. He expressed, indeed, some doubt how to prove what appeared so plain. It seemed to him (if I recollect right), to depend principally on the solution of this simple question: can a State assume [*i.e.*, make a contract]? But the attorney-general must know, that in *England*, certain judicial proceedings, not inconsistent with the sovereignty, may take place against the crown, but that an action of *assumpsit* will not lie. Yet, surely, the King can assume as well as a state. So can the *United States* themselves, as well as any state in the Union: yet, the attorney-general himself has taken some pains to show, that no action whatever is maintainable against the *United States* . . . .

[2] The question, as I before observed, is — will an action of *assumpsit* lie against a state? If it will, it must be in virtue of the constitution of the *United States*, and of some law of *Congress* conformable thereto. [Justice Iredell then quoted from the Constitution, which provides that the judicial power "shall extend" to certain heads of jurisdiction, including "all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" "controversies to which the United States shall be a party;" and "controversies . . . between a State and citizens of another State . . . ."]

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[a]Editor's note: The Attorney General, Edmund Randolph, had taken on Chisholm as a private client. He did not appear on behalf of the United States.

[3] The words of the general judicial act [*i.e.*, the Judiciary Act of 1789], conveying the authority of the supreme court, under the constitution, so far as they concern this question, are as follow[s]: —

> § 13. [T]he supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens, in which latter case, it shall have original, but not exclusive jurisdiction . . . .

* * *

[4] A general question of great importance here occurs. What controversy of a civil nature can be maintained against a State by an individual? The framers of the Constitution, I presume, must have meant one of two things: Either 1. In the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself), to refer to antecedent laws for the construction of the general words they use: Or, 2. To enable *Congress* in all such cases to pass all such laws, as they might deem necessary and proper to carry the purposes of this Constitution into full effect, either absolutely at their discretion, or at least in cases where prior laws were deficient for such purposes, if any such deficiency existed.[b]

[5] The attorney-general has indeed suggested another a construction, a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation . . . . His construction I take to be this: "That the moment a supreme court is formed, it is to exercise all the judicial power vested in it by the constitution, by its own authority, whether the legislature has prescribed methods of doing so, or not." My conception of the constitution is entirely different. I conceive, that all the courts of the *United States* must receive, not merely their *organization* as to the number of judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. This appears to me to be one of those cases, with many others, in which an article of the constitution cannot be effectuated, without the intervention of the legislative authority . . . . None will deny, that an act of Legislation is necessary to say, at least, of what number the judges are to consist; the *President*, with the consent of the *Senate*, could not nominate a number at their discretion. The Constitution intended this article so far, at least, to be the subject of a Legislative act. Having a right thus to establish the Court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings. Upon this authority, there is, that I know, but one limit; that is, "that they shall not exceed their authority."

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[b]Do you understand this paragraph? Justice Iredell appears to be speaking about cases that do not find their way into federal court because of a federal question, but instead because of the status of the parties. In those instances, he asks, how are federal courts to operate? According to established principles of law and equity, or according to congressional instructions?

. . . . Subject to this restriction, the whole business of organizing the Courts, and directing the methods of their proceeding, where necessary, I conceive to be in the discretion of *Congress* . . . .

* * *

[6] If therefore, this Court is to be (as I consider it) the organ of the *Constitution and the law*, not of the *Constitution* only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an *officina brevium* [*i.e.*, workshop of writs], or take any other short method of doing what the Constitution has chosen (and, in my opinion, with the most perfect propriety) should be done in another manner.

[7] But the act of *Congress* has not been altogether silent upon this subject. The 14th section of the judicial act, provides in the following words:

> All the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, *and agreeable to the principles and usages of law*.

These words refer as well to the supreme court as to the other courts of the *United States*. Whatever writs we issue, that are necessary for the exercise of our jurisdiction, must be *agreeable to the principles and usages of law*. This is a direction, I apprehend, we cannot supersede, because it may appear to us not sufficiently extensive. . . . .

[8] . . . . I know of [no principles of law], which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every state in the *Union*, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controls it, to be in force in each State, *as it existed in England, (unaltered by any statute) at the time of the first settlement of the country* . . . . No other part of the common law of *England*, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union*[,] in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as completely sovereign, as the *United States* are in respect to the powers surrendered . . . .

[9] [Editor's new paragraph.] The judicial power [of the United States] is of a peculiar kind. It is indeed commensurate with the ordinary Legislative and Executive powers of the general government, and the Power which concerns treaties. But is also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government [*i.e.*, although a federal court may hear some cases that do not present a federal question, nevertheless] general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the *United*

States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States[,] under the Constitution, can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the *United States*, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a State is a party, and providing laws necessary for that purpose: That surely can refer only to such controversies in which a State *can* be a party; in respect to which, if any question arises, it can be determined[,] in no other manner than by a reference either to pre-existent laws, or laws passed under the constitution and in conformity to it.[c]

[10] Whatever be the true construction of the Constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another; or as authorizing the Legislature to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption; yet it is certain, that the Legislature has in fact proceeded upon the former supposition, and not upon the latter. For, besides what I noticed before[,] as to an express reference to principles and usages of law as the guide of our proceeding, it is observable that[,] in instances like this before the Court, this Court hath a *concurrent jurisdiction* only . . . . It follows, therefore, unquestionably, I think, that looking at the act of *Congress*[,] we can exercise no authority in the present instance[,] but such as a proper State Court would have been, at least, competent to exercise, at the time the act was passed.

[11] If[,] therefore, no new remedy be provided (as is plainly the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force until superseded by others, then it is incumbent upon us to enquire, whether[,] previous to the adoption of the constitution[,] an action of the nature like this before the Court could have been maintained against one of the States in the *Union*, upon the principles of the common law, which I have shown to be alone applicable. If it could, I think, it is now maintainable here: if it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the power of *Congress* to authorize such a one. Now I presume it will not be denied, that in every State in the *Union*, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in *England* apply to claims against the crown . . . . The only remedy in a case like that before the Court, by which, by any possibility, a suit can be maintained against the crown in *England*, or could be at any period from which the common law, as in force in *America*, could be derived, I believe[,] is that which is called *a Petition of right*. [But such a petition is a matter of grace, not compulsion].

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[c]Editor's note: This is a confusing paragraph. Is Justice Iredell suggesting, obliquely, that Congress might have authority under the Constitution to establish *rules of decision* for cases in federal court in which a state is a party? His language in the next paragraph suggests that, at the very least, this is a possibility.

* * *

[12] There is no other part of the common law, besides that which I have considered, which can by any person be pretended in any manner to apply to this case, but that which concerns corporations. The applicability of this, the Attorney-General, with great candor, has expressly waived. But as it may be urged on other occasions, and as I wish to give the fullest satisfaction, I will say a few words to that doctrine. Suppose, therefore, it should be objected, that the reasoning I have now used is not conclusive, because, inasmuch as a State is made subject to the judicial power of *Congress*, its sovereignty must not stand in the way of the proper exercise of that power, and, therefore, in all such cases . . . a State can only be considered as a subordinate corporation merely . . . . Now there are, in my opinion, the most essential differences between [conventional corporations] and the great and extraordinary case of States separately possessing, as to everything simply relating to themselves, the fullest powers of sovereignty, and yet in some other defined particulars subject to a superior power composed out of themselves for the common welfare of the whole . . . . The word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic[,] whether its power be restricted or transcendant, is in this sense "a corporation." The *King*, accordingly, in *England* is called a corporation. So also, by a very respectable author is the Parliament itself. In this extensive sense, not only each State singly, but even the *United States* may without impropriety be termed "corporations." I have therefore, in contradistinction to this large and indefinite term, used the term "subordinate corporations," meaning to refer to such only . . . whose creation and whose powers are limited by law.

[13] The differences between such corporations, and the several States in the *Union*, as relative to the general Government, are very obvious in the following particulars. *1st.* A corporation is a mere creature of the *King*, or of Parliament . . . . A State does not owe its origin to the Government of the *United States*, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: *The voluntary and deliberate choice of the people*. *2d.* A corporation can do no act but what is subject to the revision either of a Court of Justice, or of some other authority within the Government. A State is altogether exempt from the jurisdiction of the Courts of the *United States*, or from any other exterior authority, unless in the special instances where the general Government has power derived from the Constitution itself. *3d.* A corporation is altogether dependant on that Government to which it owes its existence. Its charter may be forfeited by abuse. Its authority may be annihilated, without abuse, by an act of the Legislative body. A State, though subject in certain specified particulars to the authority of the Government of the *United States*, is in every other respect totally independent upon it. The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the *United States: that it must be of the Republican form*. [To be sure, the states are not nations standing apart, but this] affords no reason whatever for the Court admitting a new action to fit a case, to which no old ones apply, when the *application* of law, not the *making* of it, is the sole province of the Court.

[14] I have now, I think, established the following particulars. *1st.* That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts and prescribing their methods of proceeding. *2d.* That *Congress* has provided no new law in regard to this case, but expressly referred us to the old. *3d.* That there are no principles of the old law . . . that in any manner authorise the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.

[15] [I]t is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that[,] even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication . . . would authorise the deduction of so high a power. . . . .

[16] BLAIR, *Justice*. In considering this important case, I have thought it best to pass over all the strictures which have been made on the various European confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The Constitution of the *United States* is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the *Union*; for, no State could have become a member, but by an adoption of it by the people of that State.

[17] [Editor's new paragraph.] What then do we find there requiring the submission of individual States to the judicial authority of the *United States*? This is expressly extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State [*i.e*., the first party, the plaintiff, is the citizen, not the state]. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? [P]robably the State was first named, in respect to the dignity of a State.

[18] [Editor's new paragraph.] But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a State is plaintiff. It is, however, a sufficient answer to say, that our Constitution most certainly contemplates, in another branch of the cases enumerated, the maintaining a jurisdiction against a State, as Defendant; this is

unequivocally asserted when the judicial power of the *United States* is extended to controversies between two or more States; for there, a State must, of necessity, be a Defendant . . . .

[19] [Editor's new paragraph.] It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where *a State is a party*. Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that *Congress* has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual; [such an] argument . . . may weigh much in cases depending upon the construction of doubtful Legislative acts, but can have no force, I think, against the clear and positive directions of an act of *Congress* and of the Constitution. Let us go on as far as we can; and if, at the end of the business, notwithstanding the powers given us in the 14th section of the judicial law, we meet difficulties insurmountable to us, we must leave it to those departments of Government which have higher powers; to which, however, there may be no necessity to have recourse: Is it altogether a vain expectation, that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the *United States*, though not conformable to their own ideas of justice?

[20] [Editor's new paragraph.] Besides, this argument takes it for granted, that the judgment of the Court will be against the State; it possibly may be in favor of the State; and the difficulty vanishes. . . . . And if a State may be brought before this Court, as a Defendant, I see no reason for confining the Plaintiff to proceed by way of petition; indeed there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty.

* * *

[21] WILSON, *Justice*. This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be *sovereign*. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the *United States*? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less *radical* than this — "do the people of the *United States* form a NATION?"

* * *

[22] Let a *State* be considered as subordinate to the PEOPLE . . . . By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what

is their own, and to do justice to others. It is an *artificial* person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. . . . It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are *men*.

[23] Is the foregoing description of a State a true description? It will not be questioned but it is. Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended that there is. If justice is not done; if engagements are not fulfilled; is it[,] upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed? Less proper it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, *that he binds himself*.[d] Upon the same principles, upon which he becomes bound *by the laws*, he becomes amenable to the *Courts of Justice*, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each *singly* is undiminished; the dignity of all *jointly* must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a* SOVEREIGN *state*?" Surely not. Before a claim, so contrary . . . to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated. Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected: To take notice of some will be necessary to the full illustration of the present important cause. . . . .

[24] [A]ccording to some writers, every State, which governs itself without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of *Georgia*; whether those citizens have done, as the individuals of *England* are said, by their late instructors, to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves; or whether, like the people of other States, and of the *United States*, the citizens of *Georgia* have reserved the Supreme Power in their own hands; and on that Supreme Power have made the State *dependent*, instead of being sovereign; these are questions, to which, as a Judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the *Union*, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, — one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I

[d]Editor's note: Note the essentially Lockean nature of Justice Wilson's approach.

know, and can decide upon the knowledge, that the citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the "People of the *United States*," did *not* surrender the Supreme or sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is* NOT *a sovereign State*. . . . .

[25] There is [another] sense, in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what I presume to be one of the principal objections against the jurisdiction of this Court over the State of *Georgia*. In this sense, sovereignty is derived from a feudal source . . . . Into *England* this system was introduced by [William] the conqueror: and to this era we may, probably, refer the *English* maxim, that the *King* or sovereign is the fountain of Justice. But, in the case of the *King*, the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction.

[26] [Editor's new paragraph.] "The law," says Sir *William Blackstone*, "ascribes to the *King* the attribute of sovereignty: he is sovereign and independent within his own dominions; and owes no kind of objection to any other potentate upon earth. Hence it is, that no *suit* or action can be brought against the *King*, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power."

[27] [Editor's new paragraph.] This last position is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in *England*, and prosecuted with unwearied assiduity and care. Of this plan, the author of the Commentaries was, if not the introducer, at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and *this* side of the Atlantic, been implicitly and generally received by those, who neither examined their *principles* nor their *consequences*[.] The principle is, that all human law must be prescribed by a *superior*. This principle I mean not now to examine. Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*.

[28] I have now fixed, in the scale of things, the grade of a *State*: and have described its composure: I have considered the nature of sovereignty; and pointed its application to the proper object. I have examined the question before us, by the principles of general jurisprudence. In those principles I find nothing, which tends to evince an exemption of the State of *Georgia*, from the jurisdiction of the Court. I find everything to have a contrary tendency.

* * *

[29] [I will now] examine the important question . . . before us by the Constitution of the *United States*, and the legitimate result of that valuable instrument. Under this view, the question is naturally subdivided into two others. 1. *Could* the Constitution of the *United States* vest a jurisdiction over the State of *Georgia*? 2. *Has* that Constitution vested such jurisdiction in this Court? . . . .

* * *

[30] [O]ur national scene opens with the most magnificent object, which the nation could present. "The PEOPLE of the *United States*" are the first personages introduced. Who were those people? They were the citizens of thirteen States, each of which had a separate Constitution and Government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated [*i.e.*, exhausted] its *Legislative* authority: *Executive* or *Judicial* authority it had none. In order, therefore, to form a more perfect union[,] *those people*, among whom were the people of *Georgia*, ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, *Judicial* power is vested.

[31] The question now opens fairly to our view, *could* the *people* of those States, among whom were those of *Georgia*, bind those *States*, and *Georgia* among the others, by the Legislative, Executive, and Judicial power so vested? If the principles, on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those *States* were the *work* of those *people*; those people, and, that I may apply the case closely, the people of *Georgia*, in particular, could alter, as they pleased, their former work . . . .

[32] The next question under this head, is, — *Has* the Constitution done so? Did those people mean to exercise this, their undoubted power? . . . .

* * *

[33] Whoever considers, in a combined and comprehensive view, the *general texture* of the Constitution, will be satisfied, that the people of the *United States* intended to form themselves into a nation for *national purposes*. They instituted, for *such* purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judicia[l]; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to *such* purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the *legitimate result* of this Constitution, that the State of *Georgia* is amenable to the jurisdiction of this Court.

[34] [The foregoing] is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself. "The judicial power of the *United States* shall extend, to controversies between *two* States." *Two* States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the *United States*: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the *United States* shall extend to controversies, between a *state* and *citizens* of *another* State." Could . . . this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? . . . ..

* * *

[35] CUSHING, *Justice*. The grand and principal question in this case is, whether a State can, by the Federal Constitution, be sued by an individual citizen of another State?

[36] The point turns not upon the law or practice of *England*, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the *United States*; and particularly upon the extent of powers given to the Federal Judicial in the [Constitution].

[37] [Editor's new paragraph.] The judicial power, then, is expressly extended to "*controversies between a State and citizens of another State*." When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would [a]ffect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; "*controversies between two or more States*," where a State must of necessity be Defendant? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended?

* * *

[38] But still it may be insisted, that this will reduce States to mere corporations, and take away all sovereignty. [A]ll States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the *United States*, the Constitution marks the boundary of powers. Whatever power is deposited with the *Union* by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States. . . . . So that, I think, no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. . . . .

[39] [Some have objected that,] if a State may be sued by a citizen of another State, then the *United States* may be sued by a citizen of any of the States, or, in other words, by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence, from the different wording of the different clauses, connected with other reasons. When speaking of the *United States*, the Constitution says "*controversies to which the* UNITED STATES *shall be a party*[,]" not controversies between the *United States* and any of their citizens. When speaking of States, it says, "*controversies between two or more states; between a state and citizens of another state*." As to reasons for citizens suing a different State, which do not hold equally good for suing the *United States*; one may be, that[,] as controversies between a State and citizens of another State, might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies, may have a tendency to prevent the mischief. . . . .

[40] JAY, *Chief Justice*. The question we are now to decide has been accurately stated, viz. Is a State suable by individual citizens of another State?

[41] It is said, that *Georgia* refuses to appear and answer to the Plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such actions. In order to ascertain the merits of this objection, let us enquire, 1st. In what sense *Georgia* is a sovereign State. 2d. Whether suability is incompatible with such sovereignty. 3d. Whether the Constitution (to which *Georgia* is a party) authorises such an action against her.

* * *

[42] 1st. In determining the sense in which *Georgia* is a sovereign State, it may be useful to turn our attention to the political situation we were in prior to the Revolution, and to the political rights which emerged from the Revolution. All the country now possessed by the *United States* was then a part of the dominions appertaining to the crown of *Great Britain*. Every acre of land in this country was then held mediately or immediately by grants from that crown. All the people of this country were[,] then, subjects of the *King* of *Great Britain*, and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the *British Empire*. They were in strict sense *fellow* subjects, and in a variety of respects one people. . . . .

[43] The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of *Great Britain*, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the [idea that the United States alone constituted a sovereignty], and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people;

and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. . . . . Here we see the people acting as sovereigns of the whole country; and[,] in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner. By this great compact[,] however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, [etc.]

[44] If, then[,] it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in *Europe*, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. There is reason to suspect that some of the difficulties which embarrass the present question, arise from inattention to differences which subsist between them.

[45] It will be sufficient to observe briefly, that the sovereignties in *Europe*, and particularly in *England*, exist on *feudal* principles. That system considers the *Prince* as the *sovereign*, and the *people* as his *subjects*; it regards his *person* as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the *Prince* having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the *Prince* and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country . . . .

* * *

[46] 2d. The second object of enquiry now presents itself, viz. whether suability is compatible with State sovereignty.

[47] Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one

citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are *actually* sued, though not *personally*, sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of *Delaware*, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand[,] make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of *Delaware* as on the Mayor or other Officers of the Corporation of *Philadelphia*? Will it be said, that the fifty odd thousand citizens in *Delaware*[,] being associated under a State Government, stand in a rank so superior to the forty odd thousand of *Philadelphia*, associated under their charter, that[,] although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former? . . . .

* * *

[48] Let us now proceed to enquire whether *Georgia* has not, by being a party to the national compact, consented to be suable by individual citizens of another State. This enquiry naturally leads our attention, 1st. To the design of the Constitution. 2d. To the letter and express declaration in it.

[49] Prior to the date of the Constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. There was then no general Court of appellate jurisdiction, by whom the errors of State Courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of justice which another State might yield to her, or to her citizens . . . . There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

[50] Prior also to that period, the *United States* had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the *United States* were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States [*i.e.*, states that had not made good on their indebtedness to foreign creditors] became apparent. While *all* the States were bound to protect *each*, and the citizens of *each*, it was highly proper

and reasonable, that they should be in a capacity, not only to cause justice to be done *to* each, and the citizens of each; but also to cause justice to be done *by* each, and the citizens of each; and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure.

* * *

[51] Let us now turn to the Constitution. . . . .

* * *

[52] The question now before us renders it necessary to pay particular attention to that part of the [Constitution] which extends the judicial power "*to controversies between a state and citizens of another state*." It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a State may be *Plaintiff*. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

[53] This extension of power is *remedial*, because it is to settle controversies. It is[,] therefore, to be construed liberally. It is politic, wise, and good, that, not only the controversies, in which a State is *Plaintiff*, but also those in which a State is *Defendant*, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the *words*, we find them to be express, positive, free from ambiguity, and without room for such implied expressions . . . . If the Constitution really meant to extend these powers only to those controversies in which a State might be *Plaintiff*, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution. . . . .

* * *

[54] I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: the same section of the Constitution which extends the judicial power to *controversies* "between a State and the citizens of another State," does also extend that power to *controversies to which the United States are a party*. Now, it may be said, if the word *party* comprehends both Plaintiff and Defendant, it follows, that the *United States* may be sued by any citizen, between whom and them there may be a *controversy*. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: in all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the *United States*; but in cases of actions against the *United States*, there is no power which the

Courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the *United States*, in very different points of view.

* * *

Notes on Chisholm

1. How would you have resolved this case? If you would hold that the Constitution rejected sovereign immunity for *the states*, would you hold as well that it took the same step for *the United States*? If not, how would you justify the disparate treatment?

2. Do you understand Justice Iredell's separate opinion? Is he saying that Congress *could* abrogate the states' sovereign immunity, but simply has failed to do so, or is he saying instead that Congress *could not* abrogate the states' sovereign immunity, at least in case like *Chisholm*, even if wanted to?

3. Erie*, sort of.* What sovereign's law would resolve *Chisholm*? Georgia's? Let's assume the contract between Georgia and Chisholm's decedent, Farquhar, was executed in Charleston, South Carolina, with both delivery and payment to occur there. If so, would the operative law be that of South Carolina? In 1793, of course, the operative rule of law might simply have been the general common law. Almost certainly, however, it would not have been federal law. What effect, if any, does this have on your analysis?

[34] **Hans v. Louisiana**
134 U.S. 1 (1890)

MR. JUSTICE BRADLEY, after stating the case[,] delivered the opinion of the court.

[1] 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.

[2] The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, 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.

[3] [Editor's new paragraph.] The [constitutional] language relied on is that clause of the 3d article[,] which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority[.]"

[4] [Editor's new paragraph.] [The statutory language relied upon is the] clause of the act conferring jurisdiction upon the Circuit Court[,] to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

[5] [Editor's new paragraph.] It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. . . . .

[6] That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *In re Ayers*, 123 U.S. 443 (1887). Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

[7] In the present case the 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; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, 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*, 2 U.S. (2 Dall.) 419 (1793), 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. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. . . . .

[8] This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

[9] Looking back from our present standpoint at the decision in *Chisholm v. Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people.

[Justice Bradley then quoted remarks by Alexander Hamilton, James Madison and John Marshall from the founding era.]

[10] It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. 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, whilst 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.

[11] 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. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn v. Lord Baltimore*, 1 Ves. Sen. 444 (1750), shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. . . . .

[12] 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. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *E.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *United States v. Lee*, 106 U.S. 196 (1882); *Poindexter v. Greenhow*, 109 U.S. 63 (1883); *Virginia Coupon Cases*, 114 U.S. 269 (1885). In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

* * *

[13] 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. Whilst 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.

[14] The judgment of the Circuit Court is

Affirmed.

[The concurring opinion of Justice Harlan is omitted.]

Notes on Hans

1. In order to put *Hans* in context, we might consider four categories of cases in which a plaintiff might seek to sue a state in federal court: (1) cases in which the plaintiff is *not* a citizen of the state in question and the cause of action is *non*-federal; (2) cases in which the plaintiff is *not* a citizen of the state in question and the cause of action *is* federal; (3) cases in which the plaintiff *is* a citizen of the state in question and the cause of action is *non*-federal; and (4) cases in which the plaintiff *is* a citizen of the state in question and the cause of action *is* federal. *Chisholm* falls in the first category: Chisholm was not a citizen of Georgia, and he sued the state for breach of contract. *Hans* falls in the fourth category: Hans was a citizen of Louisiana, and he sued the state for impairment of an obligation of contract. The *Hans* Court refers to several cases in the second category — where the plaintiff is diverse, but the cause of action is federal. See ¶ [6] (citing *Louisiana v. Jumel*, 107 U.S. 711 (1883), *Hagood v. Southern*, 117 U.S. 52 (1886), and *In re Ayers*, 123 U.S. 443 (1887)). Meanwhile, cases in the third category would present no evident basis for federal jurisdiction, there being neither a federal question nor diversity. Would you interpret the Eleventh Amendment to preclude federal courts from hearing cases in second and fourth categories? Why or why not?

2. Please note that the *Hans* Court distinguishes — at least as a formal matter — actions against *officers* of the government from actions against *the government itself*. See ¶ [12] (citing *Osborn v. Bank of the United States*, 22 U.S. 738 (1824); *United States v. Lee*, 106 U.S. 196 (1882); *Poindexter v. Greenhow*, 109 U.S. 63 (1883); *Virginia Coupon Cases*, 114 U.S. 269 (1885)). You may ask yourself whether this distinction makes sense to you. When an officer commits a tort against an individual, the idea that the victim might sue the officer, without regard to sovereign immunity, makes sense. Where the officer is, in substance, merely the *custodian* of public property, however, this device might be more difficult to sustain. Please note as well that one of the cases the Court cites, *United States v. Lee*, involved a claim of sovereign immunity by *the United States*. The Court rejected this claim on the ground that the suit was in part against individuals, and not solely against the government.

3. Finally, please note that the Court confirms that a person may raise defenses against an action *by a state*. This is consistent with sovereign immunity, because a government has no grounds to assert immunity when it initiates legal process. See ¶ [13].

4. What exactly was Hans' cause of action? He was not suing under 42 U.S.C. § 1983, which is the typical vehicle for cases like this today. Was he suing directly on the Contracts Clause? Was he trying to sue under the general jurisdictional statute for federal questions, now codified at 28 U.S.C. § 1331? As you can see, the Court did not address these questions because the jurisprudence of the day did not make them important.

Ex parte Young
209 U.S. 123 (1908)

[1] An original application was made to this court for leave to file a petition for writs of *habeas corpus* and certiorari in behalf of Edward T. Young, petitioner, as Attorney General of the State of Minnesota.

[2] Leave was granted and a rule entered directing the United States marshal for the district of Minnesota[,] who held the petitioner in his custody, to show cause why such petition should not be granted.

[3] The marshal, upon the return of the order to show cause, justified his detention on the petitioner by virtue of an order of the Circuit Court of the United States for the District of Minnesota, which adjudged the petitioner guilty of contempt of that court, and directed that he be fined the sum of $100, and that he should dismiss the mandamus proceedings brought by him in the name and in behalf of the State, in the Circuit Court of the State, and that he should stand committed to the custody of the marshal until that order was obeyed. The case involves the validity of the order of the Circuit Court committing him for contempt.

* * *

[4] [The facts are these.] On the 4th of April, 1907, the legislature of the State of Minnesota passed an act fixing 2 cents a mile as the maximum passenger rate to be charged by railroads in Minnesota. (The rate had been theretofore 3 cents per mile.) The act was to take effect on the 1st of May, 1907, and was put into effect on that day by the railroad companies, and the same has been observed by them up to the present time. It was provided in the act that

> any railroad company, or any officer, agent, or representative thereof, who shall violate any provision of this act, shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand ($5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years, or both such fine and imprisonment.

[5] On the 18th of April, 1907, the legislature passed an act which established rates for the transportation of certain commodities . . . between stations in that State. The act divided the commodities to which it referred into seven classes, and set forth a schedule of maximum rates

for each class when transported in carload lots, and established the minimum weight which constituted a carload of each class.

* * *

[6] Section 6 [of this act] directed that every railroad company in the State should adopt and publish and put into effect the rates specified in the statute, and that . . .

> and any officer, director, or such agent or employee of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists, any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.

The act was to take effect June 1, 1907.

* * *

[7] On the 31st of May, 1907, the day before the act was to take effect, nine suits in equity were commenced in the Circuit Court of the United States for the district of Minnesota[,] each suit being brought by stockholders of the particular railroad mentioned in the bill, and in each case the defendants named were [among others] the railroad company of which the complainants were, respectively, stockholders[,] and the Attorney General of the State, Edward T. Young, and individual defendants, representing the shippers of freight upon the railroad.

[8] The order punishing Mr. Young for contempt was made in the suit in which Charles E. Perkins, a citizen of the State of Iowa, and David C. Shepard, a citizen of the State of Minnesota, were complainants, and the Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, Edward T. Young, petitioner herein, and others, were parties defendant. All of the defendants, except the railway company, are citizens and residents of the State of Minnesota.

[9] It was averred in the bill . . . that the objects and purposes of the suit were to enjoin the railway company from publishing or adopting (or continuing to observe, if already adopted) the rates and tariffs prescribed and set forth in the two acts of the legislature above mentioned[,] and also to enjoin the other defendants from attempting to enforce such provisions, or from instituting any action or proceeding against the defendant railway company, its officers, etc., on account of any violation thereof, for the reason that the said acts . . . were and each of them was violative of the Constitution of the United States.

[10] The bill also alleged that . . . the passenger rate act of April 4, 1907, and the act of April 18, 1907, reducing the tariffs and charges which the railway company had theretofore been permitted to make, were each and all of them unjust, unreasonable, and confiscatory, in that they each of them would, and will if enforced, deprive complainants and the railway company of their property without due process of law, and deprive them and it of the equal protection of the laws, contrary to and in violation of the Constitution of the United States and the amendments thereof. It was also averred that the complainants had demanded of the president and managing directors of the railway company that they should cease obedience . . . to the acts already mentioned, and that the rates prescribed in such . . . acts should not be put into effect, and that the said corporation, its officers and directors, should institute proper suit or suits to prevent said rates . . . from continuing or becoming effective, as the case might be, and to have the same declared illegal; but the said corporation, its president and directors, had positively declined and refused to do so, not because they considered the rates a fair and just return upon the capital invested, or that they would not be confiscatory, but because of the severity of the penalties provided for the violation of such acts[,] and therefore they could not subject themselves to the ruinous consequences which would inevitably result from failure on their part to obey the said laws [—] a result which no action by themselves, their stockholders or directors, could possibly prevent.

[11] The bill further alleged that . . . the acts of April 4, 1907, and April 18, 1907, were, in the penalties prescribed for their violation, so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof except at the risk of confiscation of its property and the imprisonment for long terms in jails and penitentiaries of its officers, agents, and employees. For this reason, the complainants alleged that the above-mentioned . . . acts, and each of them, denied to the defendant railway company and its stockholders, including the complainants, the equal protection of the laws, and deprived it and them of their property without due process of law, and that each of them was, for that reason, unconstitutional and void.

[12] The bill also contained an averment that, if the railway company should fail to [obey] . . . and the acts of April 4, 1907, and April 18, 1907, such failure might result in an action against the company or criminal proceedings against its officers, directors, agents, or employees, subjecting the company and such officers to an endless number of actions at law and criminal proceedings; that, if the company should fail to obey . . . the acts of April 4, 1907, and April 18, 1907, the said Edward T. Young, as Attorney General of the State of Minnesota, would, as complainants were advised and believed[,] institute mandamus or other proceedings for the purpose of enforcing said acts and each thereof, and the provisions and penalties thereof. Appropriate relief by injunction against the action of the defendant Young . . . was asked for.

[13] A temporary restraining order was made by the Circuit Court, which only restrained the railway company from publishing the rates as provided for in the act of April 18, 1907, and from reducing its tariffs to the figures set forth in that act, the court refusing for the present to interfere by injunction with regard to . . . the act of April 4, 1907, as the railroads had already put

[it] in operation; but it restrained Edward T. Young, Attorney General, from taking any steps against the railroads to enforce the remedies or penalties specified in the act of April 18, 1907.

[14] Copies of the bill and the restraining order were served, among others, upon the defendant Mr. Edward T. Young, Attorney General, who appeared specially and only for the purpose of moving to dismiss the bill as to him, on the ground that the court had no jurisdiction over him as Attorney General; and he averred that the State of Minnesota had not consented, and did not consent, to the commencement of this suit against him as Attorney General of the State, which suit was, in truth and effect, a suit against the said State of Minnesota contrary to the Eleventh Amendment of the Constitution of the United States.

[15] . . . . The motion was denied . . . .

[16] Thereupon, on the 23d of September, 1907, the court, after a hearing of all parties and taking proofs in regard to the issues involved, ordered a temporary injunction to issue against the railway company restraining it, pending the final hearing of the cause, from putting into effect the tariffs, rates, or charges set forth in the act approved April 18, 1907. The court also enjoined the defendant Young, as Attorney General of the State of Minnesota, pending the final hearing of the cause, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the act above mentioned, or to compel obedience to that act, or compliance therewith, or any part thereof. [The court refused to grant a preliminary injunction against obedience to, or enforcement of, the act of April 4, 1907, pending final resolution of the case.]

* * *

[17] The day after the granting of this preliminary injunction, the Attorney General, in violation of such injunction, filed a petition for an alternative writ of mandamus in one of the courts of the State, and obtained an order from that court September 24, 1907, directing the alternative writ to issue as prayed for in the petition. The writ was thereafter issued and served upon the Northern Pacific Railway Company, commanding the company, immediately after its receipt,

> to adopt and publish and keep for public inspection, as provided by law, as the rates and charges to be made, demanded, and maintained by you for the transportation of freight between stations in the State of Minnesota of the kind, character, and class named and specified in [the act of April 18, 1907], rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said [act].

[18] Upon an affidavit showing these facts, the United States Circuit Court ordered Mr. Young to show cause why he should not be punished as for a contempt for his misconduct in violating the temporary injunction issued by that court in the case therein pending.

[19] Upon the return of this order, the Attorney General filed his answer, in which he set up the same objections which he had made to the jurisdiction of the court in his motion to dismiss the bill, and in his demurrer; he disclaimed any intention to treat the court with disrespect in the commencement of the proceedings referred to, but, believing that the decision of the court in the action, holding that it had jurisdiction to enjoin him, as Attorney General, from performing his discretionary official duties, was in conflict with the Eleventh Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, he believed it to be his duty, as such Attorney General, to commence the mandamus proceedings for and in behalf of the State, and it was in this belief that the proceedings were commenced solely for the purpose of enforcing the law of the State of Minnesota. The order adjudging him in contempt was then made.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

* * *

[20] . . . . The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is, in effect, against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. . . . .

* * *

[21] Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act, the officers, directors, agents, and employees of the company are made guilty of a misdemeanor, and, upon conviction, each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding $5,000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to the [acts] in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either State or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them in case the

court should decide that the law was valid. The result would be a denial of any hearing to the company. . . . .

* * *

[22] We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the Circuit Court had jurisdiction . . . (and it was therefore its duty) to inquire whether the rates permitted by these acts . . . were too low, and therefore confiscatory, and, if so held, that the court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect.

* * *

[23] We have, therefore, upon this record, the case of an unconstitutional act of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.

[24] This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court — the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the State. . . . .

* * *

[25] [T]here have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738 (1824), which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn v. United States Bank*, said that, where the claim was made, as in the case then before the court, against the Governor of Georgia as Governor, and the demand was

made upon him not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the State government), the State might be considered as the party on the record, and therefore the suit could not be maintained.

* * *

[26] In [the] *Virginia Coupon Cases*, 114 U.S. 270, 296 (1885) (*Poindexter v. Greenhow*), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a taxpayer for nonpayment of his taxes was a suit against him personally, as a wrongdoer, and not against the State.

[27] *Hagood v. Southern*, 117 U.S. 52 (1886), decided that the bill was, in substance, a bill for the specific performance of a contract between the complainants and the State of South Carolina, and, although the State was not, in name, made a party defendant, yet, being the actual party to the alleged contract the performance of which was sought, and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which, when done, would constitute a performance of the alleged contract by the State.

[28] The cases upon the subject were reviewed, and it was held, *In re Ayers*, 123 U.S. 443 (1887), that a bill in equity brought against officers of a State who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State of the alleged contract of the State, was a suit against the State, following in this respect *Hagood v. Southern*.

* * *

[29] On the other hand, *United States v. Lee*, 106 U.S. 196 (1882), determined that an individual in possession of real estate under the government of the United States, which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority.

* * *

[30] The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

* * *

[31] It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the State, in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned . . . .

[32] The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting, by the use of the name of the State, to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. . . . .

* * *

[33] The rule to show cause is discharged and the petition for writs of *habeas corpus* and certiorari is dismissed.

So ordered.

MR. JUSTICE HARLAN, dissenting.

* * *

[34] Let it be observed that the suit instituted by Perkins and Shepard in the Circuit Court of the United States was, as to the defendant Young, one against him *as, and only because he was,* Attorney General of Minnesota. No relief was sought against him individually, but only in his capacity as Attorney General. And the manifest, indeed the avowed and admitted, object of seeking such relief, was *to tie the hands* of the *State*, so that it could not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes . . . in question. It would therefore seem clear that, within the true meaning of the Eleventh Amendment, the suit brought

in the Federal court was one, in legal effect, against the State — as much so as if the State had been formally named on the record as a party — and therefore it was a suit to which, under the Amendment, so far as the State or its Attorney General was concerned, the judicial power of the United States did not and could not extend. If this proposition be sound, it will follow — indeed, it is conceded, that if, so far as relief is sought against the Attorney General of Minnesota, this be a suit against the State, then the order of the Federal court enjoining that officer from taking any action, suit, step, or proceeding to compel the railway company to obey the Minnesota statute was beyond the jurisdiction of that court and wholly void, in which case, that officer was at liberty to proceed in the discharge of his official duties as defined by the laws of the State, and the order adjudging him to be in contempt for bringing the mandamus proceeding in the state court was a nullity.

* * *

Notes on Ex parte Young

1. As you can see, *Ex parte Young* was a *collateral* action, an attempt by Young to obtain review of an order holding him in contempt in a separate federal proceeding. See ¶¶ [18], [19]. This proceeding was brought by Perkins and Shepard against the Northern Pacific and Young. See ¶ [8]. But what was their cause of action? As you can see, they did not sue under 42 U.S.C. § 1983. Although their case would almost certainly take such form today, § 1983 probably would not have been available in a case like theirs in the early 1900s. Did they sue directly on the Fourteenth Amendment, anticipating *Bivens*? Or, did the Court infer a cause of action from the statute conferring general authority on federal courts to hear cases in which federal questions arise, now codified as 28 U.S.C. § 1331?

2. Note that the Court again attempts to distinguish situations in which a public officer may be sued individually, and sovereign immunity is no bar, from situations in which sovereign immunity controls because the state — and only the state — is the proper defendant. See ¶¶ [26]-[29] (discussing the *Virginia Coupon Cases*, 114 U.S. 270, 296 (1885), *Hagood v. Southern*, 117 U.S. 52 (1886), *In re Ayers*, 123 U.S. 443 (1887), and *United States v. Lee*, 106 U.S. 196 (1882)). As you can see, these distinctions can be quite subtle.

3. *Ex parte Young* is most famous for its description of Young as being "stripped of his official or representative character, and [thus being] subjected in his person to the consequences of his individual conduct." ¶ [32]. From this comes the so-called "stripping doctrine" of the case.

4. *Ex parte Young* had a quite a number of critics in its day. The Progressive movement had been gaining steam since the late nineteenth century, and much of its energy was devoted to regulating the rates of utilities and common carriers. Allowing such entities as the Northern Pacific to attack regulatory structures in advance of their actual application threatened to undermine this key plank of the Progressive movement. Justice Brandeis, whose dissent in

Crowell v. Benson we read earlier in the course, and who of course wrote *Erie*, was a staunch opponent of *Ex parte Young*-type actions, as well as their supposedly "mild" declaratory relatives. This same antagonism to anticipatory challenges informed Justice Frankfurter's opinion in *Skelly Oil* limiting the reach of the Federal Declaratory Judgment Act, and may even have informed his opinion in *Pullman*. Antipathy to *Ex parte Young*-type actions also explains the Three-Judge Court Act, which we have seen at work in this course, as well as the Tax Injunction Act and the Johnson Act, which we have also seen at work in this course.

5. The Court made a fairly significant dent in *Ex parte Young* in the 1981 decision *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1. In this case, the Court held that the supposed "fiction" of *Ex parte Young* is only valid where it is necessary to vindicate *federal* rights. Otherwise, wrote Justice Rehnquist, background principles of sovereign immunity should control. As a consequence, if a plaintiff brings an action in federal court against a state officer seeking injunctive or declaratory relief, and purporting to rely on *Ex parte Young* to overcome sovereign immunity, that reliance will only be valid to the extent he or she seeks to compel the defendant to conform to *federal* law. Under *Pennhurst*, a federal court is without power to enjoin a state officer to conform to *state* law.

This implicates *Pullman* abstention. In a classic *Pullman* situation, a federal court confronted with a request for equitable or declaratory relief stays its hands with respect to a *federal* issue because the plaintiff has also raised a question of *state* law, and resolution of the state issue may excuse the court from addressing the federal issue. As you may recall, the *federal* issues in *Pullman* were whether the Texas Railroad Commission's order denied equal protection, deprived the plaintiffs of liberty or property without due process of law, or unduly interfered with interstate commerce. The Court ordered the case returned to state court, however, because the plaintiffs had also attacked the Commission's authority to make the order in the first place, under the law of Texas. In the wake of *Pennhurst*, however, a plaintiff in federal court would have no reason to present state claims at all. Of course, *Pullman* might continue to operate obliquely. If, for example, the plaintiffs simply *split* their claims, bringing federal claims in federal court and state claims in state court, the defendant would most likely *advise* the federal court of the state action, and the federal judge would likely hold the case in abeyance, roughly replicating *Pullman*. If, however, the plaintiff simply *abandoned* his or her state claims, the basis for *Pullman* abstention would seem to fall away, although perhaps the defendant might move for a question to be certified to the state courts, or the federal judge might do so *sua sponte*.

[35-36] **Seminole Tribe of Florida v. Florida**
517 U.S. 44 (1996)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1] The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. The Act, passed by Congress under the Indian Commerce Clause, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), may not be used to enforce § 2710(d)(3) against a state official.

I

[2] Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes. The Act divides gaming on Indian lands into three classes[,] and provides a different regulatory scheme for each class. Class III gaming — the type with which we are here concerned — is defined as "all forms of gaming that are not class I gaming or class II gaming," and includes such things as slot machines, casino games, banking card games, dog racing, and lotteries. It is the most heavily regulated of the three classes. The Act provides that class III gaming is lawful only where it is: (1) authorized by an ordinance or resolution that (a) is adopted by the governing body of the Indian tribe, (b) satisfies certain statutorily prescribed requirements, and (c) is approved by the National Indian Gaming Commission; (2) located in a State that permits such gaming for any purpose by any person, organization, or entity; and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect."

[3] The "paragraph (3)" [referred to above] is § 2710(d)(3), which describes [among other things] the process by which a State and an Indian tribe begin negotiations toward a Tribal-State compact:

> (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

[4] The State's obligation to "negotiate with the Indian tribe in good faith" is made judicially enforceable by §§ 2710(d)(7)(A)(i) and (B)(i):

> (A) The United States district courts shall have jurisdiction over —
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .
>
> (B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

[5] Sections 2710(d)(7)(B)(ii)-(vii) describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact. A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." The mediator chooses from between the two proposed compacts the one "which best comports with the terms of [the Act] and any other applicable Federal law and with the findings and order of the court," and submits it to the State and the Indian tribe. If the State consents to the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary [of the Interior]" and that the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction."

[6] In September 1991, the Seminole Tribe of Florida, petitioner, sued the State of Florida and its Governor, Lawton Chiles, respondents. Invoking jurisdiction under 25 U.S.C. § 2710(d)(7)(A), as well as 28 U.S.C. §§ 1331 and 1362, petitioner alleged that respondents had "refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the "requirement of good faith negotiation" contained in § 2710(d)(3). Respondents moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court. The District Court denied respondents' motion, and respondents took an interlocutory appeal of that decision. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (collateral order doctrine

allows immediate appellate review of order denying claim of Eleventh Amendment immunity). The Court of Appeals for the Eleventh Circuit reversed the decision of the District Court, holding that the Eleventh Amendment barred petitioner's suit against respondents. The court agreed with the District Court that Congress in § 2710(d)(7) intended to abrogate the States' sovereign immunity, and also agreed that the Act had been passed pursuant to Congress' power under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. The court disagreed with the District Court, however, that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and concluded therefore that it had no jurisdiction over petitioner's suit against Florida. The court further held that *Ex parte Young*, 209 U.S. 123 (1908), does not permit an Indian tribe to force good-faith negotiations by suing the Governor of a State. Finding that it lacked subject-matter jurisdiction, the Eleventh Circuit remanded to the District Court with directions to dismiss petitioner's suit.

[7] Petitioner sought our review of the Eleventh Circuit's decision, and we granted certiorari in order to consider two questions: (1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and (2) Does the doctrine of *Ex parte Young* permit suits against a State's Governor for prospective injunctive relief to enforce the good-faith bargaining requirement of the Act? We answer the first question in the affirmative, the second in the negative, and we therefore affirm the Eleventh Circuit's dismissal of petitioner's suit.

[8] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'" *id.* at 13 (emphasis deleted) (quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States. *Hans*, 134 U.S. at 15.

[9] Here, petitioner has sued the State of Florida and it is undisputed that Florida has not consented to the suit. Petitioner nevertheless contends that its suit is not barred by state

sovereign immunity. First, it argues that Congress through the Act abrogated the States' sovereign immunity. Alternatively, petitioner maintains that its suit against the Governor may go forward under *Ex parte Young*, 209 U.S. 123. We consider each of those arguments in turn.

II

[10] Petitioner argues that Congress through the Act abrogated the States' immunity from suit. In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power," *id.*

A

[11] Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement." *Blatchford*, 501 U.S. at 786. This rule arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-39 (1985). In *Atascadero*, we held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S. at 246. Rather, as we said in *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989):

> To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

[12] Here, we agree with the parties, with the Eleventh Circuit in the decision below, and with virtually every other court that has confronted the question that Congress has in § 2710(d)(7) provided an "unmistakably clear" statement of its intent to abrogate. Section 2710(d)(7)(A)(i) vests jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). [W]e think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.

B

[13] Having concluded that Congress clearly intended to abrogate the States' sovereign immunity through § 2710(d)(7), we turn now to consider whether the Act was passed "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. at 68. Before we address that question here, however, we think it necessary first to define the scope of our inquiry.

[14] Petitioner suggests that one consideration weighing in favor of finding the power to abrogate here is that the Act authorizes only prospective injunctive relief rather than retroactive monetary relief. But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. See, *e.g.*, *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"). We think it follows *a fortiori* from this proposition that the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S. at 146.

[15] Similarly, petitioner argues that the abrogation power is validly exercised here because the Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands. It is true enough that the Act extends to the States a power withheld from them by the Constitution. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [discussing what might be described as the "Dormant Indian Commerce Clause"]. Nevertheless, we do not see how that consideration is relevant to the question whether Congress may abrogate state sovereign immunity. The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority. *Cf. Atascadero*, 473 U.S. at 246-47 ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court").

[16] Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? See, *e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the

Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

[17] In only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court found that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." 491 U.S. at 19-20. Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he "[did] not agree with much of [the plurality's] reasoning." *Id.* at 57 (opinion concurring in judgment in part and dissenting in part).

[18] In arguing that Congress through the Act abrogated the States' sovereign immunity, petitioner does not challenge the Eleventh Circuit's conclusion that the Act was passed pursuant to neither the Fourteenth Amendment nor the Interstate Commerce Clause. Instead, accepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that Clause grants Congress the power to abrogate the States' sovereign immunity.

[19] Petitioner begins with the plurality decision in *Union Gas* and contends that "[t]here is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause." Noting that the *Union Gas* plurality found the power to abrogate from the "plenary" character of the grant of authority over interstate commerce, petitioner emphasizes that the Interstate Commerce Clause leaves the States with some power to regulate, see, *e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), whereas the Indian Commerce Clause makes "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U. S. 226, 234 (1985). Contending that the Indian Commerce Clause vests the Federal Government with "the duty of protect[ing]" the tribes from "local ill feeling" and "the people of the States," *United States v. Kagama*, 118 U.S. 375, 383-84 (1886), petitioner argues that the abrogation power is necessary "to protect the tribes from state action denying federally guaranteed rights."

* * *

[20] Following the rationale of the *Union Gas* plurality, our inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes. Under the rationale of *Union Gas*, if the States' partial cession of authority over a particular area includes cession of the immunity from suit, then their virtually total cession of authority over a

different area must also include cession of the immunity from suit. See *id.* at 42 (SCALIA, J., joined by REHNQUIST, C.J., and O'CONNOR and KENNEDY, JJ., dissenting) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers"). We agree with petitioner that the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause.

[21] Respondents argue, however, that we need not conclude that the Indian Commerce Clause grants the power to abrogate the States' sovereign immunity. Instead, they contend that if we find the rationale of the *Union Gas* plurality to extend to the Indian Commerce Clause, then "*Union Gas* should be reconsidered and overruled." Generally, the principle of *stare decisis*, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles[,] reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), counsel strongly against reconsideration of our precedent. Nevertheless, we always have treated *stare decisis* as a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and not as an "inexorable command," *Payne*, 501 U.S. at 828. . . . .

[22] The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. We have already seen that Justice Brennan's opinion received the support of only three other Justices. See *Union Gas*, 491 U.S. at 5 (Marshall, Blackmun, and STEVENS, JJ., joined Justice Brennan). Of the other five, Justice White, who provided the fifth vote for the result, wrote separately in order to indicate his disagreement with the plurality's rationale, *id.* at 57 (opinion concurring in judgment and dissenting in part), and four Justices joined together in a dissent that rejected the plurality's rationale, *id.* at 35-45 (SCALIA, J., dissenting, joined by REHNQUIST, C.J., and O'CONNOR and KENNEDY, JJ.). Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision. See, *e.g.*, *Chavez v. Arte Publico Press*, 59 F.3d 539, 543-45 (5th Cir. 1995) ("Justice White's concurrence must be taken on its face to disavow" the plurality's theory).

[23] The plurality's rationale also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*. See *Union Gas*, 491 U.S. at 36 ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all") (SCALIA, J., dissenting). It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit . . . ." And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III," *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984). As the dissent in *Union Gas* recognized, the plurality's conclusion — that Congress

could under Article I expand the scope of the federal courts' jurisdiction under Article III — "contradict[ed] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction." *Union Gas*, 491 U.S. at 39.

[24] Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The plurality's citation of prior decisions for support was based upon what we believe to be a misreading of precedent. The plurality claimed support for its decision from a case holding the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity, and cited as precedent propositions that had been merely assumed for the sake of argument in earlier cases.

[25] The plurality's extended reliance upon our decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress could under the Fourteenth Amendment abrogate the States' sovereign immunity was also, we believe, misplaced. *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment. As the dissent in *Union Gas* made clear, *Fitzpatrick* cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution." *Union Gas*, 491 U.S. at 42 (SCALIA, J., dissenting).

[26] In the five years since it was decided, *Union Gas* has proved to be a solitary departure from established law. Reconsidering the decision in *Union Gas*, we conclude that none of the policies underlying *stare decisis* require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality. The case involved the interpretation of the Constitution and therefore may be altered only by constitutional amendment or revision by this Court. Finally, both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.

[27] The dissent makes no effort to defend the decision in *Union Gas*, but nonetheless would find congressional power to abrogate in this case. Contending that our decision is a novel extension of the Eleventh Amendment, the dissent chides us for "attend[ing]" to dicta. We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound. For over a century, we have grounded our decisions in the oft-repeated

understanding of state sovereign immunity as an essential part of the Eleventh Amendment. In *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), the Court held that the Eleventh Amendment barred a suit brought against a State by a foreign state. Chief Justice Hughes wrote for a unanimous Court:

* * *

> Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There 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."

Id. at 322-23. It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity (save in *Union Gas*). But consideration of that question must proceed with fidelity to this century-old doctrine.

[28] The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. The dissent cites not a single decision since *Hans* (other than *Union Gas*) that supports its view of state sovereign immunity, instead relying upon the now-discredited decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication.

* * *

[29] *Hans* — with a much closer vantage point than the dissent — recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution. The dissent's conclusion that the decision in *Chisholm* was "reasonable" certainly would have struck the Framers of the Eleventh Amendment as quite odd: That decision created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco*, 292 U.S. at 325. The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man — we long have recognized that blind reliance upon the text of the Eleventh Amendment is "'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Monaco*, 292 U.S. at 326 (quoting *Hans*, 134 U.S. at 15). The text dealt in terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it

until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.

[30] That same consideration causes the dissent's criticism of the views of Marshall, Madison, and Hamilton to ring hollow. The dissent cites statements made by those three influential Framers, the most natural reading of which would preclude all federal jurisdiction over an unconsenting State.[12] Struggling against this reading, however, the dissent finds significant the absence of any contention that sovereign immunity would affect the new federal-question jurisdiction. But the lack of any statute vesting general federal-question jurisdiction in the federal courts until much later makes the dissent's demand for greater specificity about a then-dormant jurisdiction overly exacting.

[31] In putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers, concluding with the statement that "[t]he Framers' principal objectives in rejecting English theories of unitary sovereignty . . . would have been impeded if a new concept of sovereign immunity had taken its place in federal-question cases, and would have been substantially thwarted if that new immunity had been held untouchable by any congressional effort to abrogate it." This sweeping statement ignores the fact that the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court. And Congress itself waited nearly a century before even conferring federal-question jurisdiction on the lower federal courts.

[32] In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

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[12]We note here also that the dissent quotes selectively from the Framers' statements that it references. The dissent cites the following, for instance, as a statement made by Madison: "the Constitution 'give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.'" But that statement, perhaps ambiguous when read in isolation, was preceded by the following: "[J]urisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal courts. It appears to me that this can have no operation but this." See 3 J. Elliot, Debates on the Federal Constitution 67 (1866).

III

[33] Petitioner argues that we may exercise jurisdiction over its suit to enforce § 2710(d)(3) against the Governor notwithstanding the jurisdictional bar of the Eleventh Amendment. Petitioner notes that since our decision in *Ex parte Young*, 209 U.S. 123 (1908), we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to "end a continuing violation of federal law." *Green v. Mansour*, 474 U.S. at 68. The situation presented here, however, is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.

[34] Here, the "continuing violation of federal law" alleged by petitioner is the Governor's failure to bring the State into compliance with § 2710(d)(3). But the duty to negotiate imposed upon the State by that statutory provision does not stand alone. Rather, as we have seen, Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7).

[35] Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

[36] Here, Congress intended § 2710(d)(3) to be enforced against the State in an action brought under § 2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3). For example, where the court finds that the State has failed to negotiate in good faith, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue. By contrast with this quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably,

contempt sanctions. If § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*.

[37] Here, of course, we have found that Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3). Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts. We hold that *Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction.

IV

[38] The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court. The narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine cannot be used to enforce § 2710(d)(3) because Congress enacted a remedial scheme, § 2710(d)(7), specifically designed for the enforcement of that right. The Eleventh Circuit's dismissal of petitioner's suit is hereby affirmed.

It is so ordered.

[The dissenting opinion of Justice Stevens is omitted.]

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

[39] In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. . . . .

[40] The fault I find with the majority today is not in its decision to reexamine *Union Gas*, for the Court in that case produced no majority for a single rationale supporting congressional authority. Instead, I part company from the Court because I am convinced that its decision is fundamentally mistaken, and for that reason I respectfully dissent.

I

[41] It is useful to separate three questions: (1) whether the States enjoyed sovereign immunity if sued in their own courts in the period prior to ratification of the National Constitution; (2) if so, whether after ratification the States were entitled to claim some such immunity when sued in a federal court exercising jurisdiction either because the suit was between a State and a nonstate litigant who was not its citizen, or because the issue in the case raised a federal question; and (3) whether any state sovereign immunity recognized in federal court may be abrogated by Congress.

[42] The answer to the first question is not clear, although some of the Framers assumed that States did enjoy immunity in their own courts. The second question was not debated at the time of ratification, except as to citizen-state diversity jurisdiction; there was no unanimity, but in due course the Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), answered that a state defendant enjoyed no such immunity. As to federal-question jurisdiction, state sovereign immunity seems not to have been debated prior to ratification, the silence probably showing a general understanding at the time that the States would have no immunity in such cases.

[43] The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants. I will explain why the Eleventh Amendment did not affect federal-question jurisdiction, a notion that needs to be understood for the light it casts on the soundness of *Hans*'s holding that States did enjoy sovereign immunity in federal-question suits. The *Hans* Court erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal-question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens. The error of *Hans*'s reasoning is underscored by its clear inconsistency with the Founders' hostility to the implicit reception of common-law doctrine as federal law, and with the Founders' conception of sovereign power as divided between the States and the National Government for the sake of very practical objectives.

[44] The Court's answer today to the third question is likewise at odds with the Founders' view that common law, when it was received into the new American legal system, was always subject to legislative amendment. In ignoring the reasons for this pervasive understanding at the time of the ratification, and in holding that a nontextual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again.

[45] Beyond this third question that elicits today's holding, there is one further issue. To reach the Court's result, it must not only hold the *Hans* doctrine to be outside the reach of Congress, but must also displace the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that an officer of the government may be ordered prospectively to follow federal law, in cases in which the government may not itself be sued directly. None of its reasons for displacing *Young*'s jurisdictional doctrine withstand scrutiny.

A

[46] The doctrine of sovereign immunity comprises two distinct rules, which are not always separately recognized. The one rule holds that the King or the Crown, as the font of law, is not bound by the law's provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts. The one rule limits the reach of substantive law; the other, the jurisdiction of the courts. We are concerned here only with the latter rule, which took its common-law form in the high Middle Ages. "At least as early as the thirteenth century, during the reign of Henry III (1216-1272), it was recognized that the king could not be sued in his own courts." C. Jacobs, Eleventh Amendment and Sovereign Immunity 5 (1972).

[47] The significance of this doctrine in the nascent American law is less clear, however, than its early development and steady endurance in England might suggest. While some colonial governments may have enjoyed some such immunity, the scope (and even the existence) of this governmental immunity in pre-Revolutionary America remains disputed.

[48] Whatever the scope of sovereign immunity might have been in the Colonies, however, or during the period of Confederation, the proposal to establish a National Government under the Constitution drafted in 1787 presented a prospect unknown to the common law prior to the American experience: the States would become parts of a system in which sovereignty over even domestic matters would be divided or parcelled out between the States and the Nation, the latter to be invested with its own judicial power and the right to prevail against the States whenever their respective substantive laws might be in conflict. With this prospect in mind, the 1787 Constitution might have addressed state sovereign immunity by eliminating whatever sovereign immunity the States previously had, as to any matter subject to federal law or jurisdiction; by recognizing an analogue to the old immunity in the new context of federal jurisdiction, but subject to abrogation as to any matter within that jurisdiction; or by enshrining a doctrine of inviolable state sovereign immunity in the text, thereby giving it constitutional protection in the new federal jurisdiction.

[49] The 1787 draft in fact said nothing on the subject, and it was this very silence that occasioned some, though apparently not widespread, dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity as it could have done on any matter of nonfederal law litigated in its own courts. As it has come down to us, the discussion gave no attention to congressional power under the proposed Article I but focused entirely on the limits of the judicial power provided in Article III. And although the jurisdictional bases together constituting the judicial power of the national courts under § 2 of Article III included questions arising under federal law and cases between States and individuals who are not citizens, it was only upon the latter

citizen-state diversity provisions that preratification questions about state immunity from suit or liability centered.[4]

[50] Later in my discussion I will canvass the details of the debate among the Framers and other leaders of the time; for now it is enough to say that there was no consensus on the issue. There was, on the contrary, a clear disagreement, which was left to fester during the ratification period, to be resolved only thereafter. One other point, however, was also clear: the debate addressed only the question whether ratification of the Constitution would, in diversity cases and without more, abrogate the state sovereign immunity or allow it to have some application. We have no record that anyone argued for the third option mentioned above, that the Constitution would affirmatively guarantee state sovereign immunity against any congressional action to the contrary. Nor would there have been any apparent justification for any such argument, since no clause in the proposed (and ratified) Constitution even so much as suggested such a position. It may have been reasonable to contend (as we will see that Madison, Marshall, and Hamilton did) that Article III would not alter States' pre-existing common-law immunity despite its unqualified grant of jurisdiction over diversity suits against States. But then, as now, there was no textual support for contending that Article III or any other provision would "constitutionalize" state sovereign immunity, and no one uttered any such contention.

B

[51] The argument among the Framers and their friends about sovereign immunity in federal citizen-state diversity cases, in any event, was short lived and ended when this Court, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), chose between the constitutional alternatives of abrogation and recognition of the immunity enjoyed at common law. The 4-to-1 majority adopted the reasonable (although not compelled) interpretation that the first of the two Citizen-State Diversity Clauses abrogated for purposes of federal jurisdiction any immunity the States might have enjoyed in their own courts, and Georgia was accordingly held subject to the judicial power in a common-law assumpsit action by a South Carolina citizen suing to collect a debt. The case also settled, by implication, any question there could possibly have been about recognizing state sovereign immunity in actions depending on the federal question (or "arising under") head of jurisdiction as well. The constitutional text on federal-question jurisdiction, after all, was just as devoid of immunity language as it was on citizen-state diversity, and at the time

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[4]The one statement I have found on the subject of States' immunity in federal-question cases was an opinion that immunity would not be applicable in these cases: James Wilson, in the Pennsylvania ratification debate, stated that the federal-question clause would require States to make good on pre-Revolutionary debt owed to English merchants (the enforcement of which was promised in the Treaty of 1783) and thereby "show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." 2 J. Elliot, Debates on the Federal Constitution 490 (2d ed. 1836).

of *Chisholm* any influence that general common-law immunity might have had as an interpretive force in construing constitutional language would presumably have been no greater when addressing the federal-question language of Article III than its Diversity Clauses.

[52] Although Justice Iredell's dissent in *Chisholm* seems at times to reserve judgment on what I have called the third question, whether Congress could authorize suits against the States, his argument is largely devoted to stating the position taken by several federalists that state sovereign immunity was cognizable under the Citizen-State Diversity Clauses, not that state immunity was somehow invisibly codified as an independent constitutional defense. As Justice Stevens persuasively explains in greater detail, Justice Iredell's dissent focused on the construction of the Judiciary Act of 1789, not Article III. This would have been an odd focus, had he believed that Congress lacked the constitutional authority to impose liability. Instead, on Justice Iredell's view, States sued in diversity retained the common-law sovereignty "where no special act of Legislation controuls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country." 2 U.S. at 435 (emphasis deleted). While in at least some circumstances States might be held liable to "the authority of the United States," *id.* at 436, any such liability would depend upon "laws passed under the Constitution and in conformity to it," *id.* Finding no congressional action abrogating Georgia's common-law immunity, Justice Iredell concluded that the State should not be liable to suit.

C

[53] The Eleventh Amendment, of course, repudiated *Chisholm* and clearly divested federal courts of some jurisdiction as to cases against state parties:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

There are two plausible readings of this provision's text. Under the first, it simply repeals the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant. Under the second, it strips the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit. Neither reading of the Amendment, of course, furnishes authority for the Court's view in today's case, but we need to choose between the competing readings for the light that will be shed on the *Hans* doctrine and the legitimacy of inflating that doctrine to the point of constitutional immutability as the Court has chosen to do. The history and structure of the Eleventh Amendment convincingly show that it reaches only to

suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses.[8] In precisely tracking the language in Article III providing for citizen-state diversity jurisdiction, the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed. If the Framers had meant the Amendment to bar federal-question suits as well, they could not only have made their intentions clearer very easily, but could simply have adopted the first post-*Chisholm* proposal, introduced in the House of Representatives by Theodore Sedgwick of Massachusetts on instructions from the Legislature of that Commonwealth. Its provisions would have had exactly that expansive effect:

> [N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

Gazette of the United States 303 (Feb. 20, 1793).

[54] With its references to suits by citizens as well as noncitizens, the Sedgwick amendment would necessarily have been applied beyond the Diversity Clauses, and for a reason that would have been wholly obvious to the people of the time. Sedgwick sought such a broad amendment because many of the States, including his own, owed debts subject to collection under the Treaty of Paris. Suits to collect such debts would "arise under" that Treaty and thus be subject to federal-question jurisdiction under Article III. Such a suit, indeed, was then already pending against Massachusetts, having been brought in this Court by Christopher Vassal, an

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[8]The great weight of scholarly commentary agrees. See, *e.g.*, Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1 (1988); Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987); Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978). While a minority has adopted the second view set out above, see, *e.g.*, Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342 (1989); Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61 (1989), and others have criticized the diversity theory, see, *e.g.*, Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation, 102 Harv. L. Rev. 1372 (1989), I have discovered no commentator affirmatively advocating the position taken by the Court today. As one scholar has observed, the literature is "remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states." Jackson, 98 Yale L.J. at 44 n.179.

erstwhile Bostonian whose move to England on the eve of revolutionary hostilities had presented his former neighbors with the irresistible temptation to confiscate his vacant mansion.

[55] Congress took no action on Sedgwick's proposal, however, and the Amendment as ultimately adopted two years later could hardly have been meant to limit federal-question jurisdiction, or it would never have left the States open to federal-question suits by their own citizens. To be sure, the majority of state creditors were not citizens, but nothing in the Treaty would have prevented foreign creditors from selling their debt instruments (thereby assigning their claims) to citizens of the debtor State. If the Framers of the Eleventh Amendment had meant it to immunize States from federal-question suits like those that might be brought to enforce the Treaty of Paris, they would surely have drafted the Amendment differently.

[56] It should accordingly come as no surprise that the weightiest commentary following the Amendment's adoption described it simply as constricting the scope of the Citizen-State Diversity Clauses. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), for instance, Chief Justice Marshall, writing for the Court, emphasized that the Amendment had no effect on federal courts' jurisdiction grounded on the "arising under" provision of Article III and concluded that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case." *Id.* at 383. The point of the Eleventh Amendment, according to *Cohens*, was to bar jurisdiction in suits at common law by Revolutionary War debt creditors, not "to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation." *Id.* at 407.

* * *

[57] The good sense of this early construction of the Amendment as affecting the diversity jurisdiction and no more has the further virtue of making sense of this Court's repeated exercise of appellate jurisdiction in federal-question suits brought against States in their own courts by out-of-staters. Exercising appellate jurisdiction in these cases would have been patent error if the Eleventh Amendment limited federal-question jurisdiction, for the Amendment's unconditional language ("shall not be construed") makes no distinction between trial and appellate jurisdiction. And yet, again and again we have entertained such appellate cases, even when brought against the State in its own name by a private plaintiff for money damages. The best explanation for our practice belongs to Chief Justice Marshall: the Eleventh Amendment bars only those suits in which the sole basis for federal jurisdiction is diversity of citizenship.

[58] In sum, reading the Eleventh Amendment solely as a limit on citizen-state diversity jurisdiction has the virtue of coherence with this Court's practice, with the views of John Marshall, with the history of the Amendment's drafting, and with its allusive language. Today's majority does not appear to disagree, at least insofar as the constitutional text is concerned; the Court concedes, after all, that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts."

[59] Thus, regardless of which of the two plausible readings one adopts, the further point to note here is that there is no possible argument that the Eleventh Amendment, by its terms, deprives federal courts of jurisdiction over all citizen lawsuits against the States. Not even the Court advances that proposition, and there would be no textual basis for doing so. Because the plaintiffs in today's case are citizens of the State that they are suing, the Eleventh Amendment simply does not apply to them. We must therefore look elsewhere for the source of that immunity by which the Court says their suit is barred from a federal court.[13]

II

[60] The obvious place to look elsewhere, of course, is *Hans v. Louisiana*, 134 U.S. 1 (1890), and *Hans* was indeed a leap in the direction of today's holding, even though it does not take the Court all the way. The parties in *Hans* raised, and the Court in that case answered, only what I have called the second question, that is, whether the Constitution, without more, permits a State to plead sovereign immunity to bar the exercise of federal-question jurisdiction. Although the Court invoked a principle of sovereign immunity to cure what it took to be the Eleventh Amendment's anomaly of barring only those state suits brought by noncitizen plaintiffs, the *Hans* Court had no occasion to consider whether Congress could abrogate that background immunity by statute. Indeed (except in the special circumstance of Congress's power to enforce the Civil War Amendments), this question never came before our Court until *Union Gas*, and any intimations of an answer in prior cases were mere dicta. In *Union Gas* the Court held that the immunity recognized in *Hans* had no constitutional status and was subject to congressional abrogation. Today the Court overrules *Union Gas* and holds just the opposite. In deciding how to choose between these two positions, the place to begin is with *Hans*'s holding that a principle of sovereign immunity derived from the common law insulates a State from federal-question jurisdiction at the suit of its own citizen. A critical examination of that case will show that it was wrongly decided, as virtually every recent commentator has concluded. It follows that the Court's further step today of constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law.

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[13]The majority chides me that the "lengthy analysis of the text of the Eleventh Amendment is directed at a straw man." But plain text is the Man of Steel in a confrontation with "background principle[s]" and "postulates which limit and control." An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing. This is particularly true in construing the jurisdictional provisions of Article III, which speak with a clarity not to be found in some of the more open-textured provisions of the Constitution. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting). That the Court thinks otherwise is an indication of just how far it has strayed beyond the boundaries of traditional constitutional analysis.

A

[61] The Louisiana plaintiff in *Hans* held bonds issued by that State, which, like virtually all of the Southern States, had issued them in substantial amounts during the Reconstruction era to finance public improvements aimed at stimulating industrial development. As Reconstruction governments collapsed, however, the post-Reconstruction regimes sought to repudiate these debts, and the *Hans* litigation arose out of Louisiana's attempt to renege on its bond obligations.

[62] Hans sued the State in federal court, asserting that the State's default amounted to an impairment of the obligation of its contracts in violation of the Contract Clause. This Court affirmed the dismissal of the suit, despite the fact that the case fell within the federal court's "arising under," or federal-question, jurisdiction. Justice Bradley's opinion did not purport to hold that the terms either of Article III or of the Eleventh Amendment barred the suit, but that the ancient doctrine of sovereign immunity that had inspired adoption of the Eleventh Amendment applied to cases beyond the Amendment's scope and otherwise within the federal-question jurisdiction. Indeed, Bradley explicitly admitted that "[i]t is true, the amendment does so read [as to permit Hans's suit], and if there were no other reason or ground for abating his suit, it might be maintainable." *Hans*, 134 U.S. at 10. The Court elected, nonetheless, to recognize a broader immunity doctrine, despite the want of any textual manifestation, because of what the Court described as the anomaly that would have resulted otherwise: the Eleventh Amendment (according to the Court) would have barred a federal-question suit by a noncitizen, but the State would have been subject to federal jurisdiction at its own citizen's behest. The State was accordingly held to be free to resist suit without its consent, which it might grant or withhold as it pleased.

[63] *Hans* thus addressed the issue implicated (though not directly raised) in the preratification debate about the Citizen-State Diversity Clauses and implicitly settled by *Chisholm*: whether state sovereign immunity was cognizable by federal courts on the exercise of federal-question jurisdiction. According to *Hans*, and contrary to *Chisholm*, it was. But that is all that *Hans* held. Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation.

[64] Taking *Hans* only as far as its holding, its vulnerability is apparent. The Court rested its opinion on avoiding the supposed anomaly of recognizing jurisdiction to entertain a citizen's federal-question suit, but not one brought by a noncitizen. There was, however, no such anomaly at all. As already explained, federal-question cases are not touched by the Eleventh Amendment, which leaves a State open to federal-question suits by citizens and noncitizens alike. If Hans had been from Massachusetts the Eleventh Amendment would not have barred his action against Louisiana.

[65] Although there was thus no anomaly to be cured by *Hans*, the case certainly created its own anomaly in leaving federal courts entirely without jurisdiction to enforce paramount

federal law at the behest of a citizen against a State that broke it. It destroyed the congruence of the judicial power under Article III with the substantive guarantees of the Constitution, and with the provisions of statutes passed by Congress in the exercise of its power under Article I: when a State injured an individual in violation of federal law no federal forum could provide direct relief. . . . .

* * *

[66] How such a result could have been threatened on the basis of a principle not so much as mentioned in the Constitution is difficult to understand. But history provides the explanation. As I have already said, *Hans* was one episode in a long story of debt repudiation by the States of the former Confederacy after the end of Reconstruction. The turning point in the States' favor came with the Compromise of 1877, when the Republican Party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes. See J. Orth, Judicial Power of the United States: The Eleventh Amendment in American History 53-57 (1987). The troop withdrawal, of course, left the federal judiciary "effectively without power to resist the rapidly coalescing repudiation movement." Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1981 (1983). Contract Clause suits like the one brought by Hans thus presented this Court with "a draconian choice between repudiation of some of its most inviolable constitutional doctrines and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments." *Id.* at 1974. Indeed, Louisiana's brief in *Hans* unmistakably bore witness to this Court's inability to enforce a judgment against a recalcitrant State: "The solemn obligation of a government arising on its own acknowledged bond would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment." Given the likelihood that a judgment against the State could not be enforced, it is not wholly surprising that the *Hans* Court found a way to avoid the certainty of the State's contempt.

[67] So it is that history explains, but does not honor, *Hans*. The ultimate demerit of the case centers, however, not on its politics but on the legal errors on which it rested. Before considering those errors, it is necessary to address the Court's contention that subsequent cases have read into *Hans* what was not there to begin with, that is, a background principle of sovereign immunity that is constitutional in stature and therefore unalterable by Congress.

B

[68] The majority does not dispute the point that *Hans v. Louisiana*, 134 U.S. 1 (1890), had no occasion to decide whether Congress could abrogate a State's immunity from federal-question suits. The Court insists, however, that the negative answer to that question that it finds in *Hans* and subsequent opinions is not "mere *obiter dicta*, but rather . . . the well-established

rationale upon which the Court based the results of its earlier decisions." The exact rationale to which the majority refers, unfortunately, is not easy to discern. The Court's opinion says, immediately after its discussion of *stare decisis*, that "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." This cannot be the "rationale," though, because this Court has repeatedly acknowledged that the Eleventh Amendment standing alone cannot bar a federal-question suit against a State brought by a state citizen. See, *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 662 (1974) (acknowledging that "the Amendment by its terms does not bar suits against a State by its own citizens"). Indeed, as I have noted, Justice Bradley's opinion in *Hans* conceded that Hans might successfully have pursued his claim "if there were no other reason or ground [other than the Amendment itself] for abating his suit." 134 U.S. at 10. The *Hans* Court, rather, held the suit barred by a nonconstitutional common-law immunity.

[69] The "rationale" which the majority seeks to invoke is, I think, more nearly stated in its quotation from *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934). There, the Court said that "we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States." *Id.* at 322. This statement certainly is true to *Hans*, which clearly recognized a pre-existing principle of sovereign immunity, broader than the Eleventh Amendment itself, that will ordinarily bar federal-question suits against a nonconsenting State. That was the "rationale" which was sufficient to decide *Hans* and all of its progeny prior to *Union Gas*. But leaving aside the indefensibility of that rationale, which I will address further below, that was as far as it went.

[70] The majority, however, would read the "rationale" of *Hans* and its line of subsequent cases as answering the further question whether the "postulate" of sovereign immunity that "limit[s] and control[s]" the exercise of Article III jurisdiction, *Monaco*, 292 U.S. at 322, is constitutional in stature and therefore unalterable by Congress. It is true that there are statements in the cases that point toward just this conclusion. See, *e.g.*, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III"); *Ex parte New York*, 256 U.S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . . ."). These statements, however, are dicta in the classic sense, that is, sheer speculation about what would happen in cases not before the court. . . . .

[71] The most damning evidence for the Court's theory that *Hans* rests on a broad rationale of immunity unalterable by Congress, however, is the Court's proven tendency to disregard the post-*Hans* dicta in cases where that dicta would have mattered. If it is indeed true that "private suits against States [are] not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment)," *Union Gas*, 491 U.S. at 40 (SCALIA, J., concurring in part and dissenting in part), then it is hard to see how a State's sovereign immunity may be waived any more than it may be abrogated by Congress. See, *e.g.*, *Atascadero*

State Hospital v. Scanlon, 473 U.S. at 238 (recognizing that immunity may be waived). After all, consent of a party is in all other instances wholly insufficient to create subject-matter jurisdiction where it would not otherwise exist. Likewise, the Court's broad theory of immunity runs doubly afoul of the appellate jurisdiction problem that I noted earlier in rejecting an interpretation of the Eleventh Amendment's text that would bar federal-question suits. If "the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent," *Duhne v. New Jersey*, 251 U.S. 311, 313 (1920), and if consent to suit in state court is not sufficient to show consent in federal court, see *Atascadero*, 473 U.S. at 241, then Article III would hardly permit this Court to exercise appellate jurisdiction over issues of federal law arising in lawsuits brought against the States in their own courts. We have, however, quite rightly ignored any post-*Hans* dicta in that sort of case and exercised the jurisdiction that the plain text of Article III provides.

[72] If these examples were not enough to distinguish *Hans*'s rationale of a pre-existing doctrine of sovereign immunity from the post-*Hans* dicta indicating that this immunity is constitutional, one would need only to consider a final set of cases: those in which we have assumed, without deciding, that congressional power to abrogate state sovereign immunity exists even when § 5 of the Fourteenth Amendment has no application. A majority of this Court was willing to make that assumption in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 101 (1989) (plurality opinion), in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 475 (1987) (plurality opinion), and in *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 252 (1985). Although the Court in each of these cases failed to find abrogation for lack of a clear statement of congressional intent, the assumption that such power was available would hardly have been permissible if, at that time, today's majority's view of the law had been firmly established. It is one thing, after all, to avoid an open constitutional question by assuming an answer and rejecting the claim on another ground; it is quite another to avoid a settled rationale (an emphatically settled one if the majority is to be taken seriously) only to reach an issue of statutory construction that the Court would otherwise not have to decide. Even worse, the Court could not have been unaware that its decision of cases like *Hoffman* and *Welch*, on the ground that the statutes at issue lacked a plain statement of intent to abrogate, would invite Congress to attempt abrogation in statutes like the Indian Gaming Regulatory Act. Such a course would have been wholly irresponsible if, as the majority now claims, the constitutionally unalterable nature of *Hans* immunity had been well established for a hundred years.

[73] *Hans* itself recognized that an "observation [in a prior case that] was unnecessary to the decision, and in that sense *extra judicial* . . . ought not to outweigh" present reasoning that points to a different conclusion. 134 U.S. at 20. That is good advice, which Members of today's majority have been willing to heed on other occasions. But because the Court disregards this norm today, I must consider the soundness of *Hans*'s original recognition of a background principle of sovereign immunity that applies even in federal-question suits, and the reasons that counsel against the Court's extension of *Hans*'s holding to the point of rendering its immunity unalterable by Congress.

III

[74] Three critical errors in *Hans* weigh against constitutionalizing its holding as the majority does today. The first we have already seen: the *Hans* Court misread the Eleventh Amendment. It also misunderstood the conditions under which common-law doctrines were received or rejected at the time of the founding, and it fundamentally mistook the very nature of sovereignty in the young Republic that was supposed to entail a State's immunity to federal-question jurisdiction in a federal court. While I would not, as a matter of *stare decisis*, overrule *Hans* today, an understanding of its failings on these points will show how the Court today simply compounds already serious error in taking *Hans* the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it.

A

[75] There is and could be no dispute that the doctrine of sovereign immunity that *Hans* purported to apply had its origins in the "familiar doctrine of the common law," *The Siren*, 74 U.S. (7 Wall.) 152, 153 (1869), "derived from the laws and practices of our English ancestors," *United States v. Lee*, 106 U.S. 196, 205 (1882). Although statutes came to affect its importance in the succeeding centuries, the doctrine was never reduced to codification, and Americans took their understanding of immunity doctrine from Blackstone, see 3 W. Blackstone, Commentaries on the Laws of England, ch. 17 (1768). Here, as in the mother country, it remained a common-law rule.

[76] This fact of the doctrine's common-law status in the period covering the founding and the later adoption of the Eleventh Amendment should have raised a warning flag to the *Hans* Court and it should do the same for the Court today. For although the Court has persistently assumed that the common law's presence in the minds of the early Framers must have functioned as a limitation on their understanding of the new Nation's constitutional powers, this turns out not to be so at all. One of the characteristics of the founding generation, on the contrary, was its joinder of an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic. It is not that the Framers failed to see themselves to be children of the common law . . . . But still it is clear that the adoption of English common law in America was not taken for granted, and that the exact manner and extent of the common law's reception were subject to careful consideration by courts and legislatures in each of the new States. An examination of the States' experience with common-law reception will shed light on subsequent theory and practice at the national level, and demonstrate that our history is entirely at odds with *Hans*'s resort to a common-law principle to limit the Constitution's contrary text.

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* * *

[77] Understandably, even the trend toward acceptance of the common law that had developed in the late colonial period was imperiled by the Revolution and the ultimate break between the Colonies and the old country. Dean Pound has observed that, "[f]or a generation after the Revolution[,] political conditions gave rise to a general distrust of English law. . . . The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century." R. Pound, The Formative Era of American Law 7 (1938). James Monroe went so far as to write in 1802 that "the application of the principles of the English common law to our constitution" should be considered "good cause for impeachment." Letter from James Monroe to John Breckenridge, Jan. 15, 1802 (quoted in 3 A. Beveridge, The Life of John Marshall: Conflict and Construction 1800-1815, p. 59 (1919)). . . . .

* * *

2

[78] While the States had limited their reception of English common law to principles appropriate to American conditions, the 1787 draft Constitution contained no provision for adopting the common law at all. This omission stood in sharp contrast to the state constitutions then extant, virtually all of which contained explicit provisions dealing with common-law reception. Since the experience in the States set the stage for thinking at the national level, this failure to address the notion of common-law reception could not have been inadvertent. Instead, the Framers chose to recognize only particular common-law concepts, such as the writ of habeas corpus, and the distinction between law and equity, by specific reference in the constitutional text. This approach reflected widespread agreement that ratification would not itself entail a general reception of the common law of England. See Letter from John Marshall to St. George Tucker, Nov. 27, 1800, reprinted in Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231 (1985), App. A, at 1326 ("I do not believe one man can be found" who maintains "that the common law of England has . . . been adopted as the common law of America by the Constitution of the United States").

[79] Records of the ratification debates support Marshall's understanding that everyone had to know that the new Constitution would not draw the common law in its train. Antifederalists like George Mason went so far as to object that under the proposed Constitution the people would not be "secured even in the enjoyment of the benefit of the common law." Mason, Objections to This Constitution of Government, in 2 Records of the Federal Convention of 1787, p. 637 (M. Farrand ed. 1911). In particular, the Antifederalists worried about the failure of the proposed Constitution to provide for a reception of "the great rights associated with due process" such as the right to a jury trial, Jay, 133 U. Pa. at 1256, and they argued that

"Congress's powers to regulate the proceedings of federal courts made the fate of these common-law procedural protections uncertain," *id.* at 1257. While Federalists met this objection by arguing that nothing in the Constitution necessarily excluded the fundamental common-law protections associated with due process, see, *e.g.*, 3 Elliot's Debates 451 (George Nicholas, Virginia Convention), they defended the decision against any general constitutional reception of the common law on the ground that constitutionalizing it would render it "immutable," see *id.* at 469-70 (Edmund Randolph, Virginia Convention), and not subject to revision by Congress, *id.* at 550 (Edmund Pendleton, Virginia Convention).

[80] The Framers also recognized that the diverse development of the common law in the several States made a general federal reception impossible. "The common law was not the same in any two of the Colonies," Madison observed; "in some the modifications were materially and extensively different." Report on the Virginia Resolutions, House of Delegates, Session of 1799-1800, Concerning Alien and Sedition Laws, in 6 Writings of James Madison 373 (G. Hunt ed. 1906). In particular, although there is little evidence regarding the immunity enjoyed by the various colonial governments prior to the Revolution, the profound differences as to the source of colonial authority between chartered colonies, royal colonies, and so on seems unlikely, wholly apart from other differences in circumstance, to have given rise to a uniform body of immunity law. There was not, then, any unified "Common Law" in America that the Federal Constitution could adopt, and, in particular, probably no common principle of sovereign immunity. The Framers may, as Madison, Hamilton, and Marshall argued, have contemplated that federal courts would respect state immunity law in diversity cases, but the generalized principle of immunity that today's majority would graft onto the Constitution itself may well never have developed with any common clarity and, in any event, has not been shown to have existed.

* * *

B

[81] Given the refusal to entertain any wholesale reception of common law, given the failure of the new Constitution to make any provision for adoption of common law as such, and given the protests already quoted that no general reception had occurred, the *Hans* Court and the Court today cannot reasonably argue that something like the old immunity doctrine somehow slipped in as a tacit but enforceable background principle. The evidence is even more specific, however, that there was no pervasive understanding that sovereign immunity had limited federal-question jurisdiction.

1

[82] As I have already noted briefly, the Framers and their contemporaries did not agree about the place of common-law state sovereign immunity even as to federal jurisdiction resting on the Citizen-State Diversity Clauses. Edmund Randolph argued in favor of ratification on the

ground that the immunity would not be recognized, leaving the States subject to jurisdiction. Patrick Henry opposed ratification on the basis of exactly the same reading. On the other hand, James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification of Article III, so as to be at a State's disposal when jurisdiction would depend on diversity. This would have left the States free to enjoy a traditional immunity as defendants without barring the exercise of judicial power over them if they chose to enter the federal courts as diversity plaintiffs or to waive their immunity as diversity defendants. See 3 Elliot's Debates at 533 (Madison: the Constitution "give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it"); *id.* at 556 (Marshall: "I see a difficulty in making a state defendant, which does not prevent its being plaintiff"). As Hamilton stated in The Federalist No. 81:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.

The Federalist No. 81, pp. 548-49 (J. Cooke ed. 1961). The majority sees in these statements, and chiefly in Hamilton's discussion of sovereign immunity in The Federalist No. 81, an unequivocal mandate "which would preclude all federal jurisdiction over an unconsenting State." But there is no such mandate to be found.

[83] As I have already said, the immediate context of Hamilton's discussion in Federalist No. 81 has nothing to do with federal-question cases. It addresses a suggestion "that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities." The Federalist No. 81, at 548. Hamilton is plainly talking about a suit subject to a federal court's jurisdiction under the Citizen-State Diversity Clauses of Article III.

* * *

[84] Thus, the Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided. The Court's difficulty is far more fundamental, however, than inconsistency with a particular quotation, for the Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.

[85] We said in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), that "the States entered the federal system with their sovereignty intact," but we surely did not mean that they entered that system with the sovereignty they would have claimed if each State had assumed independent existence in the community of nations, for even the Articles of Confederation allowed for less than that. While there is no need here to calculate exactly how close the American States came to sovereignty in the classic sense prior to ratification of the Constitution, it is clear that the act of ratification affected their sovereignty in a way different from any previous political event in America or anywhere else. For the adoption of the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy.

[86] As a matter of political theory, this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war had been. See, *e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty"). Before the new federal scheme appeared, 18th-century political theorists had assumed that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself." B. Bailyn, The Ideological Origins of the American Revolution 198 (1967). The American development of divided sovereign powers, which "shatter[ed] . . . the categories of government that had dominated Western thinking for centuries," *id.* at 385, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves. The People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit. As James Wilson emphasized, the location of ultimate sovereignty in the People meant that "[t]hey can distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States." 1 Pennsylvania and the Federal Constitution, 1787-1788, at 302 (J. McMaster & F. Stone, eds. 1888).

[87] Under such a scheme, Alexander Hamilton explained, "[i]t does not follow . . . that each of the *portions* of powers delegated to [the national or state government] is not sovereign *with regard to its proper objects*." Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, in 8 Papers of Alexander Hamilton 98 (Syrett ed. 1965). A necessary consequence of this view was that "the Government of the United States has sovereign power as to its declared purposes & trusts." *Id.* Justice Iredell was to make the same observation in his *Chisholm* dissent, commenting that "[t]he United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved." 2 U.S. at 435. And to the same point was Chief Justice Marshall's description of the National and State Governments as "each sovereign, with respect to the objects committed to it,

and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

[88] Given this metamorphosis of the idea of sovereignty in the years leading up to 1789, the question whether the old immunity doctrine might have been received as something suitable for the new world of federal-question jurisdiction is a crucial one. The answer is that sovereign immunity as it would have been known to the Framers before ratification thereafter became inapplicable as a matter of logic in a federal suit raising a federal question. The old doctrine, after all, barred the involuntary subjection of a sovereign to the system of justice and law of which it was itself the font, since to do otherwise would have struck the common-law mind from the Middle Ages onward as both impractical and absurd. But the ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere. When individuals sued States to enforce federal rights, the Government that corresponded to the "sovereign" in the traditional common-law sense was not the State but the National Government, and any state immunity from the jurisdiction of the Nation's courts would have required a grant from the true sovereign, the people, in their Constitution, or from the Congress that the Constitution had empowered. We made a similar point in *Nevada v. Hall*, 440 U.S. 410, 416 (1979), where we considered a suit against a State in another State's courts:

> This [traditional] explanation [of sovereign immunity] adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

Cf. United States v. Texas, 143 U.S. 621, 646 (1892) (recognizing that a suit by the National Government against a State "does no violence to the inherent nature of sovereignty"). Subjecting States to federal jurisdiction in federal-question cases brought by individuals thus reflected nothing more than Professor Amar's apt summary that "[w]here governments are acting within the bounds of their delegated 'sovereign' power, they may partake of sovereign immunity; where not, not." Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1490-91 n.261 (1987).

* * *

[89] This sketch of the logic and objectives of the new federal order is confirmed by what we have previously seen of the preratification debate on state sovereign immunity, which in turn becomes entirely intelligible both in what it addressed and what it ignored. It is understandable that reasonable minds differed on the applicability of the immunity doctrine in suits that made it to federal court only under the original Diversity Clauses, for their features

were not wholly novel. While they were, of course, in the courts of the new and, for some purposes, paramount National Government, the law that they implicated was largely the old common law (and in any case was not federal law). It was not foolish, therefore, to ask whether the old law brought the old defenses with it. But it is equally understandable that questions seem not to have been raised about state sovereign immunity in federal-question cases. The very idea of a federal question depended on the rejection of the simple concept of sovereignty from which the immunity doctrine had developed; under the English common law, the question of immunity in a system of layered sovereignty simply could not have arisen. The Framers' principal objectives in rejecting English theories of unitary sovereignty, moreover, would have been impeded if a new concept of sovereign immunity had taken its place in federal-question cases, and would have been substantially thwarted if that new immunity had been held to be untouchable by any congressional effort to abrogate it.

[90] Today's majority discounts this concern. Without citing a single source to the contrary, the Court dismisses the historical evidence regarding the Framers' vision of the relationship between national and state sovereignty, and reassures us that "the Nation survived for nearly two centuries without the question of the existence of [the abrogation] power ever being presented to this Court." But we are concerned here not with the survival of the Nation but the opportunity of its citizens to enforce federal rights in a way that Congress provides. The absence of any general federal-question statute for nearly a century following ratification of Article III (with a brief exception in 1800) hardly counts against the importance of that jurisdiction either in the Framers' conception or in current reality; likewise, the fact that Congress has not often seen fit to use its power of abrogation (outside the Fourteenth Amendment context, at least) does not compel a conclusion that the power is not important to the federal scheme. In the end, is it plausible to contend that the plan of the convention was meant to leave the National Government without any way to render individuals capable of enforcing their federal rights directly against an intransigent State?

C

[91] The considerations expressed so far, based on text, *Chisholm*, caution in common-law reception, and sovereignty theory, have pointed both to the mistakes inherent in *Hans* and, even more strongly, to the error of today's holding. Although for reasons of *stare decisis* I would not today disturb the century-old precedent, I surely would not extend its error by placing the common-law immunity it mistakenly recognized beyond the power of Congress to abrogate. In doing just that, however, today's decision declaring state sovereign immunity itself immune from abrogation in federal-question cases is open to a further set of objections peculiar to itself. For today's decision stands condemned alike by the Framers' abhorrence of any notion that such common-law rules as might be received into the new legal systems would be beyond the legislative power to alter or repeal, and by its resonance with this Court's previous essays in constitutionalizing common-law rules at the expense of legislative authority.

* * *

IV

[92] The Court's holding that the States' *Hans* immunity may not be abrogated by Congress leads to the final question in this case, whether federal-question jurisdiction exists to order prospective relief enforcing IGRA against a state officer, respondent Chiles, who is said to be authorized to take the action required by the federal law. Just as with the issue about authority to order the State as such, this question is entirely jurisdictional, and we need not consider here whether petitioner Seminole Tribe would have a meritorious argument for relief, or how much practical relief the requested order (to bargain in good faith) would actually provide to the Tribe. Nor, of course, does the issue turn in any way on one's views about the scope of the Eleventh Amendment or *Hans* and its doctrine, for we ask whether the state officer is subject to jurisdiction only on the assumption that action directly against the State is barred. The answer to this question is an easy yes, the officer is subject to suit under the rule in *Ex parte Young*, 209 U.S. 123 (1908), and the case could, and should, readily be decided on this point alone.

A

[93] In *Ex parte Young*, this Court held that a federal court has jurisdiction in a suit against a state officer to enjoin official actions violating federal law, even though the State itself may be immune. Under *Young*, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979); see also *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

* * *

[94] It should be no cause for surprise that *Young* itself appeared when it did in the national law. It followed as a matter of course after the *Hans* Court's broad recognition of immunity in federal-question cases, simply because "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). *Young* provided, as it does today, a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III.

* * *

C

* * *

[95] No clear statement of intent to displace the doctrine of *Ex parte Young* occurs in IGRA, and the Court is instead constrained to rest its effort to skirt *Young* on a series of suggestions thought to be apparent in Congress's provision of "intricate procedures" for enforcing a State's obligation under the Act. The procedures are said to implicate a rule against

judicial creativity in devising supplementary procedures; it is said that applying *Young* would nullify the statutory procedures; and finally the statutory provisions are said simply to reveal a congressional intent to preclude the application of *Young*.

* * *

2

[96] [T]he Court suggests that it may be justified in displacing *Young* because *Young* would allow litigants to ignore the "intricate procedures" of IGRA in favor of a menu of streamlined equity rules from which any litigant could order as he saw fit. But there is no basis in law for this suggestion, and the strongest authority to reject it. *Young* did not establish a new cause of action and it does not impose any particular procedural regime in the suits it permits. It stands, instead, for a jurisdictional rule by which paramount federal law may be enforced in a federal court by substituting a nonimmune party (the state officer) for an immune one (the State itself). *Young* does no more and furnishes no authority for the Court's assumption that it somehow pre-empts procedural rules devised by Congress for particular kinds of cases that may depend on *Young* for federal jurisdiction.

[97] If, indeed, the Court were correct in assuming that Congress may not regulate the procedure of a suit jurisdictionally dependent on *Young*, the consequences would be revolutionary, for example, in habeas law. It is well established that when a habeas corpus petitioner sues a state official alleging detention in violation of federal law and seeking the prospective remedy of release from custody, it is the doctrine identified in *Ex parte Young* that allows the petitioner to evade the jurisdictional bar of the Eleventh Amendment (or, more properly, the *Hans* doctrine). And yet Congress has imposed a number of restrictions upon the habeas remedy, see, *e.g.*, 28 U.S.C. § 2254(b) (requiring exhaustion of state remedies prior to bringing a federal habeas petition), and this Court has articulated several more. By suggesting that *Ex parte Young* provides a free-standing remedy not subject to the restrictions otherwise imposed on federal remedial schemes (such as habeas corpus), the Court suggests that a state prisoner may circumvent these restrictions by ostensibly bringing his suit under *Young* rather than 28 U.S.C. § 2254. The Court's view implies similar consequences under any number of similarly structured federal statutory schemes.

[98] This, of course, cannot be the law, and the plausible rationale for rejecting the Court's contrary assumption is that Congress has just as much authority to regulate suits when jurisdiction depends on *Young* as it has to regulate when *Young* is out of the jurisdictional picture. If *Young* does not preclude Congress from requiring state exhaustion in habeas cases (and it clearly does not), then *Young* does not bar the application of IGRA's procedures when effective relief is sought by suing a state officer.

* * *

[99] Finally, one must judge the Court's purported inference by stepping back to ask why Congress could possibly have intended to jeopardize the enforcement of the statute by excluding application of *Young*'s traditional jurisdictional rule, when that rule would make the difference between success or failure in the federal court if state sovereign immunity was recognized. Why would Congress have wanted to go for broke on the issue of state immunity in the event the State pleaded immunity as a jurisdictional bar? Why would Congress not have wanted IGRA to be enforced by means of a traditional doctrine giving federal courts jurisdiction over state officers, in an effort to harmonize state sovereign immunity with federal law that is paramount under the Supremacy Clause? There are no plausible answers to these questions.

V

[100] Because neither text, precedent, nor history supports the majority's abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III, I would reverse the judgment of the Court of Appeals.

Notes on Seminole

1. As you might have noticed, there are two basic approaches to sovereign immunity at work in *Seminole*. The first, often referred to as the "immunity model," is adhered to by five members of the Court. Under this model, the words of the Eleventh Amendment merely provide evidence of broad immunity that states enjoy from suit. In other words, as Chief Justice Hughes wrote in *Monaco v. Mississippi*, adherents of this model do not hold that "the letter of the Eleventh Amendment *exhausts* the restrictions upon suits against non-consenting States." 292 U.S. 313, 322 (1934) (emphasis added).

The second approach, often referred to as the "diversity model," is adhered to by four members of the Court. Under this model, which requires a more elaborate explanation than the previous one, one first asks who the "relevant sovereign" is for the rule of law at issue. That is, one asks what sovereign is responsible for the rule of law for whose alleged violation someone is attempting to bring a state into court. Once one has ascertained the relevant sovereign, one then asks whether this sovereign has abrogated (*i.e.*, abolished by formal means) the state's sovereign immunity for alleged violations *of the particular rule of law*. For an alleged violation of the Constitution of the United States, the relevant sovereign would be "We the People of the United States of America," or, more precisely, the people who ratified the particular provision of the Constitution at issue. For federal legislation, the relevant sovereign would be Congress. Finally, for non-federal law, including the common law, the relevant sovereign would usually be a particular state, as in *Chisholm v. Georgia*.

Adhering to the immunity model, the majority in *Seminole* has little difficulty concluding that Florida enjoys immunity from suit at the hands of the tribe, even though the literal words of the Eleventh Amendment do not apply to an action brought by a group of individuals who reside in Florida. This is because, under this model, Florida's immunity is broader than the literal words of the amendment, which itself only describes *one aspect* of the state's immunity, not every aspect.

Adhering to the diversity model, Justice Souter, writing in dissent, emphasizes that *Congress* wrote the Indian Gaming Regulatory Act, and that *Congress* abrogated Florida's immunity clearly and unequivocally in that act. In other words, the relevant sovereign has chosen, in this particular instance, to make the state amenable to suit in federal court. Note that, by this logic, Chisholm would not be able to sue Georgia in federal court, because the relevant sovereign, perhaps South Carolina, perhaps Georgia, would not have chosen to abrogate Georgia's sovereign immunity.

2. The second holding of *Seminole* is that Congress implicitly foreclosed resort to *Ex parte Young* to enforce the substantive provisions of IGRA when it included within IGRA its own elaborate mechanism for enforcement. See ¶ [36]. In a subsequent case, *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the Court applied this principle to a claim by health care providers that the State of Idaho was inadequately reimbursing them in violation of Medicaid. This statute required participating states (which now includes every state) to make payments to providers "consistent with efficiency, economy, and quality of care" and "sufficient to enlist enough providers so that care and services are available under the [Medicaid] plan at least to the extent that such care and services are available to the general population in the geographic area." The providers attempted to bring an *Ex parte Young*-type action to compel payments in conformity to these standards. The Court rejected their attempt, however, because Medicaid set forth its own remedy for failure to meet these standards, relying ultimately on the ability of the Secretary of Health and Human Services to withhold funds. The Court also reasoned that the standards for payment were far too indeterminate for judicial enforcement.

[37] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board
527 U.S. 666 (1999)

JUSTICE SCALIA delivered the opinion of the Court.

[1] The Trademark Remedy Clarification Act (TRCA) subjects the States to suits brought under § 43(a) of the Trademark Act of 1946 (Lanham Act) for false and misleading advertising. The question presented in this case is whether that provision is effective to permit suit against a State for its alleged misrepresentation of its own product — either because the TRCA effects a constitutionally permissible abrogation of state sovereign immunity, or because the TRCA operates as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Lanham Act.

I

[2] In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), we asserted jurisdiction over an action in assumpsit brought by a South Carolina citizen against the State of Georgia. In so doing, we reasoned that Georgia's sovereign immunity was qualified by the general jurisdictional provisions of Article III, and, most specifically, by the provision extending the federal judicial power to controversies "between a State and Citizens of another State." The "shock of surprise" created by this decision, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934), prompted the immediate adoption of the Eleventh Amendment, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union. This has been our understanding of the Amendment since the landmark case of *Hans v. Louisiana*, 134 U.S. 1 (1890). See also *Ex parte New York*, 256 U.S. 490, 497-98 (1921); *Principality of Monaco*, 292 U.S. at 320-28, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 66-68 (1996).

[3] While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment — an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Second, a State may waive its sovereign immunity by

consenting to suit. *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). This case turns on whether either of these two circumstances is present.

II

[4] Section 43(a) of the Lanham Act, enacted in 1946, created a private right of action against "[a]ny person" who uses false descriptions or makes false representations in commerce. The TRCA amends § 43(a) by defining "any person" to include "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." The TRCA further amends the Lanham Act to provide that such state entities "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act," and that remedies shall be available against such state entities "to the same extent as such remedies are available . . . in a suit against" a nonstate entity.

[5] Petitioner College Savings Bank is a New Jersey chartered bank located in Princeton, New Jersey. Since 1987, it has marketed and sold CollegeSure certificates of deposit designed to finance the costs of college education. College Savings holds a patent upon the methodology of administering its CollegeSure certificates. Respondent Florida Prepaid Postsecondary Education Expense Board is an arm of the State of Florida. Since 1988, it has administered a tuition prepayment program designed to provide individuals with sufficient funds to cover future college expenses. College Savings brought a patent infringement action against Florida Prepaid in United States District Court in New Jersey. That action is the subject of today's decision in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*. In addition, and in the same court, College Savings filed the instant action alleging that Florida Prepaid violated § 43(a) of the Lanham Act by making misstatements about its own tuition savings plans in its brochures and annual reports.

[6] Florida Prepaid moved to dismiss this action on the ground that it was barred by sovereign immunity. It argued that Congress had not abrogated sovereign immunity in this case because the TRCA was enacted pursuant to Congress's powers under Article I of the Constitution and, under our decisions in *Seminole Tribe* and *Fitzpatrick*, Congress can abrogate state sovereign immunity only when it legislates to enforce the Fourteenth Amendment. The United States intervened to defend the constitutionality of the TRCA. Both it and College Savings argued that, under the doctrine of constructive waiver articulated in *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964), Florida Prepaid had waived its immunity from Lanham Act suits by engaging in the interstate marketing and administration of its program after the TRCA made clear that such activity would subject Florida Prepaid to suit. College Savings also argued that Congress's purported abrogation of Florida Prepaid's sovereign immunity in the TRCA was effective, since it was enacted not merely pursuant to Article I but also to enforce the Due Process Clause of the Fourteenth Amendment. The District Court rejected both of these

arguments and granted Florida Prepaid's motion to dismiss. The Court of Appeals affirmed. We granted certiorari.

III

[7] We turn first to the contention that Florida's sovereign immunity was validly abrogated. Our decision three Terms ago in *Seminole Tribe* held that the power "to regulate Commerce" conferred by Article I of the Constitution gives Congress no authority to abrogate state sovereign immunity. As authority for the abrogation in the present case, petitioner relies upon § 5 of the Fourteenth Amendment, which we held in *Fitzpatrick v. Bitzer*, and reaffirmed in *Seminole Tribe*, could be used for that purpose.

[8] Section 1 of the Fourteenth Amendment provides that no State shall "deprive any person of . . . property . . . without due process of law." Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We made clear in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the term "enforce" is to be taken seriously — that the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations. Petitioner claims that, with respect to § 43(a) of the Lanham Act, Congress enacted the TRCA to remedy and prevent state deprivations without due process of two species of "property" rights: (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests. Neither of these qualifies as a property right protected by the Due Process Clause.

[9] As to the first: The hallmark of a protected property interest is the right to exclude others. That is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). That is why the right that we all possess to use the public lands is not the "property" right of anyone — hence the sardonic maxim, explaining what economists call the "tragedy of the commons," *res publica, res nullius*. The Lanham Act may well contain provisions that protect constitutionally cognizable property interests — notably, its provisions dealing with infringement of trademarks, which are the "property" of the owner because he can exclude others from using them. The Lanham Act's false-advertising provisions, however, bear no relationship to any right to exclude; and Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion.

* * *

[10] [As to the second:] Petitioner [also] argues that businesses are "property" within the meaning of the Due Process Clause, and that Congress legislates under § 5 when it passes a law that prevents state interference with business (which false advertising does). The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a "deprivation" under the Fourteenth Amendment. But business in the

sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense — and it is only *that*, and not any business asset, which is impinged upon by a competitors' false advertising.

[11] Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of § 5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was genuinely necessary to prevent violation of the Fourteenth Amendment. We turn next to the question whether Florida's sovereign immunity, though not abrogated, was voluntarily waived.

IV

[12] We have long recognized that a State's sovereign immunity is "a personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108 U.S. at 447. The decision to waive that immunity, however, "is altogether voluntary on the part of the sovereignty." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). See also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed"). Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900). Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 149-50 (1981) (*per curiam*), or even by authorizing suits against it "in any court of competent jurisdiction," *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. See *Beers v. Arkansas*.

[13] There is no suggestion here that respondent Florida Prepaid expressly consented to being sued in federal court. Nor is this a case in which the State has affirmatively invoked our jurisdiction. Rather, petitioner College Savings and the United States both maintain that Florida Prepaid has "impliedly" or "constructively" waived its immunity from Lanham Act suit. They do so on the authority of *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964) — an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign immunity) jurisprudence. In *Parden*, we permitted employees of a railroad owned and operated by Alabama to bring an action under the Federal Employers' Liability Act against their employer. Despite the absence of any provision in the statute specifically referring to the States, we held that the Act

authorized suits against the States by virtue of its general provision subjecting to suit "[e]very common carrier by railroad . . . engaging in commerce between . . . the several States." We further held that Alabama had waived its immunity from FELA suit even though Alabama law expressly disavowed any such waiver:

> By enacting the [FELA] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U.S. at 192. The four dissenting Justices in *Parden* refused to infer a waiver because Congress had not "expressly declared" that a *State* operating in commerce would be subject to liability, but they went on to acknowledge — in a concession that, strictly speaking, was not necessary to their analysis — that Congress possessed the power to effect such a waiver of the State's constitutionally protected immunity so long as it did so with clarity. See *id.* at 198-200 (opinion of White, J.).

[14] Only nine years later, in *Employees of Dept. of Public Health and Welfare of Mo. v. Department of Public Health and Welfare of Mo.*, 411 U.S. 279 (1973), we began to retreat from *Parden*. That case held — in an opinion written by one of the *Parden* dissenters over the solitary dissent of *Parden*'s author — that the State of Missouri was immune from a suit brought under the Fair Labor Standards Act by employees of its state health facilities. Although the statute specifically covered the state hospitals in question, and such coverage was unquestionably enforceable in federal court by the United States, we did not think that the statute expressed with clarity Congress's intention to supersede the States' immunity from suits brought by individuals. We "put to one side" the *Parden* case, which we characterized as involving "dramatic circumstances" and "a rather isolated state activity," 411 U.S. at 285, unlike the provision of the Fair Labor Standards Act in question that applied to a broad class of state employees. We also distinguished the railroad in *Parden* on the ground that it was "operated for profit" "in the area where private persons and corporations normally ran the enterprise." 411 U.S. at 284 . Justice Marshall, joined by Justice Stewart, went even further, concluding that although, in their view, Congress *had* clearly purported to subject the States to suits by individuals in federal courts, it lacked the constitutional authority to do so. See *id.* at 287, 289-90 (opinion concurring in result).

[15] The next year, we observed (in dictum) that there is "no place" for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Several Terms later, in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), although we expressly avoided addressing the constitutionality of Congress's conditioning a State's engaging in Commerce-Clause activity upon the State's waiver of sovereign immunity, we said there was "no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good

law," and overruled *Parden* "to the extent [it] is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language," 483 U.S. at 478 & n. 8.

[16] College Savings and the United States concede, as they surely must, that these intervening decisions have seriously limited the holding of *Parden*. They maintain, however, that *Employees* and *Welch* are distinguishable, and that a core principle of *Parden* remains good law. A *Parden*-style waiver of immunity, they say, is still possible after *Employees* and *Welch* so long as the following two conditions are satisfied: First, Congress must provide unambiguously that the State will be subject to suit if it engages in certain specified conduct governed by federal regulation. Second, the State must voluntarily elect to engage in the federally regulated conduct that subjects it to suit. In this latter regard, their argument goes, a State is never deemed to have constructively waived its sovereign immunity by engaging in activities that it cannot realistically choose to abandon, such as the operation of a police force; but constructive waiver is appropriate where a State runs an enterprise for profit, operates in a field traditionally occupied by private persons or corporations, engages in activities sufficiently removed from "core [state] functions," or otherwise acts as a "market participant" in interstate commerce, *cf. White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 206-08 (1983). On this theory, Florida Prepaid constructively waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and advertising a for-profit educational investment vehicle in interstate commerce after being put on notice by the clear language of the TRCA that it would be subject to Lanham Act liability for doing so.

[17] We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, *Parden* broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, *Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law. Today, we drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.

[18] To begin with, we cannot square *Parden* with our cases requiring that a State's express waiver of sovereign immunity be unequivocal. The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity. *Beers*, 61 U.S. at 529.

[19] Indeed, *Parden*-style waivers are simply unheard of in the context of other constitutionally protected privileges. As we said in *Edelman*, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." 415 U.S. at 673. For example, imagine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. And in the context of *federal* sovereign immunity — obviously the closest analogy to the present case — it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.

* * *

[20] Nor do we think that the constitutionally grounded principle of state sovereign immunity is any less robust where, as here, the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of "market participants." Permitting abrogation or constructive waiver of the constitutional right only when these conditions exist would of course limit the evil — but it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month. Since sovereign immunity itself was not traditionally limited by these factors, and since they have no bearing upon the voluntariness of the waiver, there is no principled reason why they should enter into our waiver analysis. When we held in *Seminole Tribe* that sovereign immunity barred an action brought under the Indian Gaming Regulatory Act against the State of Florida for its alleged failure to negotiate a gambling compact with the Seminole Tribe of Indians, we did not pause to consider whether Florida's decision not to negotiate was somehow involuntary. Nor did we pause to consider whether running a tugboat towing service at "fair and reasonable rates" was for-profit, was traditionally performed by private citizens and corporations, and otherwise resembled the behavior of "market participants" when we held, in *Ex parte New York*, 256 U.S. 490 (1921), that sovereign immunity foreclosed an admiralty action against the State of New York for damages caused by the State's engaging in such activity. *Hans* itself involved an action against Louisiana to recover coupons on a bond — the issuance of which surely rendered Louisiana a participant in the financial markets.

* * *

V

[21] The principal thrust of JUSTICE BREYER's dissent is an attack upon the very legitimacy of state sovereign immunity itself. In this regard, JUSTICE BREYER and the other dissenters proclaim that they are "not *yet* ready" (emphasis added) to adhere to the still-warm precedent of *Seminole Tribe* and to the 110-year-old decision in *Hans* that supports it.[5] Accordingly, JUSTICE BREYER reiterates (but only in outline form, thankfully) the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods. The arguments recited in these sources have been soundly refuted, and the position for which they have been marshaled has been rejected by constitutional tradition and precedent as clear and conclusive, and almost as venerable, as that which consigns debate over whether *Marbury v. Madison* was wrongly decided to forums more other-worldly than ours. . . . .

* * *

[22] Concluding, for the foregoing reasons, that the sovereign immunity of the State of Florida was neither validly abrogated by the Tradmark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce, we hold that the federal courts are

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[5]JUSTICE BREYER purports to "accept this Court's pre-*Seminole Tribe* sovereign immunity decisions," but by that he could not mean *Hans*, but rather only the distorted view of *Hans* that prevailed briefly between *Parden* and *Seminole Tribe*. *Parden* was the first case to suggest that the sovereign immunity announced in *Hans* was so fragile a flower that it could be abrogated under Article I — a suggestion contrary to the reality that *Hans itself* involved a congressional conferral of jurisdiction enacted under Article I. See *Union Gas*, 491 U.S. at 36 -37 (SCALIA, J., dissenting). Moreover, that conferral of jurisdiction was combined, in *Hans*, with a substantive claim under the Contracts Clause of the Constitution itself, which one would think to have greater, rather than lesser, abrogative force than a substantive statute enacted pursuant to the Commerce Clause. (The dissent would apparently interpose that the statute in *Hans* did not expressly "purpor[t] to pierce state immunity" (quoting *Seminole Tribe*, 517 U.S. at 119 (SOUTER, J., dissenting) — but the opinion in *Hans* did not allude to that refinement, nor did *Parden* think it made any difference. The so-called "clear statement rule" was not even adumbrated until nine years after *Parden*, in *Employees*, , 411 U.S. at 284-85.) It is difficult to square the dissent's reliance upon the distinction that the present case involves a federal question (and is therefore not explicitly covered by the Eleventh Amendment) with its professed fidelity to *Hans*, the whole point of which was that the sovereign immunity reflected in (rather than created by) the Eleventh Amendment transcends the narrow text of the Amendment itself. Or to put it differently, the "pre-*Seminole Tribe* sovereign immunity decisions" to which the dissent pledges allegiance appear to include *Chisholm v. Georgia*. But see U.S. Const. Amdt. 11.

without jurisdiction to entertain this suit against an arm of the State of Florida. The judgment of the Third Circuit dismissing the action is affirmed.

It is so ordered.

[The dissenting opinion of Justice Stevens is omitted.]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

* * *

I

* * *

[23] Far from being anomalous, *Parden*'s holding finds support in reason and precedent. When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily at private conduct. And a Congress that includes the State not only within its substantive regulatory rules but also (expressly) within a related system of private remedies likely believes that a remedial exemption would similarly threaten that program. It thereby avoids an enforcement gap which, when allied with the pressures of a competitive marketplace, could place the State's regulated private competitors at a significant disadvantage.

[24] These considerations make Congress' need to possess the power to condition entry into the market upon a waiver of sovereign immunity (as "necessary and proper" to the exercise of its commerce power) unusually strong, for to deny Congress that power would deny Congress the power effectively to regulate *private* conduct. At the same time they make a State's need to exercise sovereign immunity unusually weak, for the State is unlikely to *have to* supply what private firms already supply, nor may it fairly demand special treatment, even to protect the public purse, when it does so. Neither can one easily imagine what the Constitution's founders would have thought about the assertion of sovereign immunity in this special context. These considerations, differing in kind or degree from those that would support a general congressional "abrogation" power, indicate that *Parden*'s holding is sound, irrespective of this Court's decisions in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999).

* * *

II

[25] I resist all the more strongly the Court's extension of *Seminole Tribe* in this case because, although I accept this Court's pre-*Seminole Tribe* sovereign immunity decisions, I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*. In my view, Congress does possess the authority to abrogate a State's sovereign immunity where "necessary and proper" to the exercise of an Article I power. My reasons include those that JUSTICES STEVENS and SOUTER already have described in detail.

III

[26] I do not know whether the State has engaged in false advertising or unfair competition as College Savings Bank alleges. But this case was dismissed at the threshhold. Congress has clearly said that College Savings Bank may bring a Lanham Act suit in these circumstances. For the reasons set forth in this opinion, I believe Congress has the constitutional power so to provide. I would therefore reverse the judgment of the Court of Appeals.

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank
527 U.S. 627 (1999)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1] In 1992, Congress amended the patent laws and expressly abrogated the States' sovereign immunity from claims of patent infringement. Respondent College Savings then sued the State of Florida for patent infringement, and the Court of Appeals held that Congress had validly abrogated the State's sovereign immunity from infringement suits pursuant to its authority under § 5 of the Fourteenth Amendment. We hold that, under *City of Boerne v. Flores*, 521 U.S. 507 (1997), the statute cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause, and accordingly reverse the decision of the Court of Appeals.

I

[2] Since 1987, respondent College Savings Bank, a New Jersey chartered savings bank located in Princeton, New Jersey, has marketed and sold certificates of deposit known as the CollegeSure CD, which are essentially annuity contracts for financing future college expenses. College Savings obtained a patent for its financing methodology, designed to guarantee investors sufficient funds to cover the costs of tuition for colleges. Petitioner Florida Prepaid Postsecondary Education Expenses Board is an entity created by the State of Florida that administers similar tuition prepayment contracts available to Florida residents and their children. College Savings claims that, in the course of administering its tuition prepayment program, Florida Prepaid directly and indirectly infringed College Savings' patent.

[3] College Savings brought an infringement action under 35 U.S.C. § 271(a) against Florida Prepaid in the United States District Court for the District of New Jersey in November 1994. By the time College Savings filed its suit, Congress had already passed the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. §§ 271(h), 296(a). Before this legislation, the patent laws stated only that "whoever" without authority made, used, or sold a patented invention infringed the patent. Applying this Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985), the Federal Circuit had held that the patent laws failed to contain the requisite statement of intent to abrogate state sovereign immunity from infringement suits. See, *e.g.*, *Chew v. California*, 893 F.2d 331 (1989). In response to *Chew* and similar decisions, Congress enacted the Patent Remedy Act to "clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of patents and plant variety protections." Pub. L. 102-560, preamble, 106 Stat. 4230. Section 271(h) now states: "As used in this section, the term 'whoever' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity." Section 296(a) addresses the sovereign immunity issue even more specifically:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent under section 271, or for any other violation under this title.

Relying on these provisions, College Savings alleged that Florida Prepaid had willfully infringed its patent under § 271, as well as contributed to and induced infringement. College Savings sought declaratory and injunctive relief as well as damages, attorney's fees, and costs.

[4] After this Court decided *Seminole Tribe of Fla v. Florida*, 517 U.S. 44 (1996), Florida Prepaid moved to dismiss the action on the grounds of sovereign immunity. Florida Prepaid argued that the Patent Remedy Act was an unconstitutional attempt by Congress to use its Article I powers to abrogate state sovereign immunity. College Savings responded that Congress had properly exercised its power pursuant to § 5 of the Fourteenth Amendment to enforce the guarantees of the Due Process Clause in § 1 of the Amendment. The United States intervened to defend the constitutionality of the statute. Agreeing with College Savings, the District Court denied Florida Prepaid's motion to dismiss, and the Federal Circuit affirmed.

[5] The Federal Circuit held that Congress had clearly expressed its intent to abrogate the States' immunity from suit in federal court for patent infringement, and that Congress had the power under § 5 of the Fourteenth Amendment to do so. The court reasoned that patents are property subject to the protections of the Due Process Clause and that Congress' objective in enacting the Patent Remedy Act was permissible because it sought to prevent States from depriving patent owners of this property without due process. The court rejected Florida

Prepaid's argument that it and other States had not deprived patent owners of their property *without due process*, and refused to "deny Congress the authority to subject all states to suit for patent infringement in the federal courts, regardless of the extent of procedural due process that may exist at any particular time." Finally, the court held that the Patent Remedy Act was a proportionate response to state infringement and an appropriate measure to protect patent owners' property under this Court's decision in *City of Boerne*. The court concluded that significant harm results from state infringement of patents, and "[t]here is no sound reason to hold that Congress cannot subject a state to the same civil consequences that face a private party infringer." We granted certiorari and now reverse.

II

* * *

[6] College Savings and the United States . . . contend that Congress' enactment of the Patent Remedy Act validly abrogated the States' sovereign immunity. To determine the merits of this proposition, we must answer two questions: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity[,]' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, 517 U.S. at 55. We agree with the parties and the Federal Circuit that in enacting the Patent Remedy Act, Congress has made its intention to abrogate the States' immunity "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Indeed, Congress' intent to abrogate could not have been any clearer.

[7] Whether Congress had the power to compel States to surrender their sovereign immunity for these purposes, however, is another matter. Congress justified the Patent Remedy Act under three sources of constitutional authority: the Patent Clause, Art. I, § 8, cl. 8; the Interstate Commerce Clause, Art. I, § 8, cl. 3; and § 5 of the Fourteenth Amendment. In *Seminole Tribe*, of course, this Court overruled the plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), our only prior case finding congressional authority to abrogate state sovereign immunity pursuant to an Article I power (the Commerce Clause). *Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause. The Federal Circuit recognized this, and College Savings and the United States do not contend otherwise.

[8] Instead, College Savings and the United States argue that the Federal Circuit properly concluded that Congress enacted the Patent Remedy Act to secure the Fourteenth Amendment's protections against deprivations of property without due process of law. . . . . While reaffirming the view that state sovereign immunity does not yield to Congress' Article I powers, this Court in *Seminole Tribe* also reaffirmed its holding in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment. . . . .

[9] College Savings and the United States are correct in suggesting that "appropriate" legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty. Congress itself apparently thought the Patent Remedy Act could be so justified . . . . We have held that "[t]he 'provisions of this article,' to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment." *City of Boerne v. Flores*, 521 U.S. at 519.

[10] But the legislation must nonetheless be "appropriate" under § 5 as that term was construed in *City of Boerne*. There, this Court held that the Religious Freedom Restoration Act of 1993 exceeded Congress' authority under § 5 of the Fourteenth Amendment, insofar as RFRA was made applicable to the States. RFRA was enacted "in direct response to" this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which construed the Free Exercise Clause of the First Amendment to hold that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne*, 521 U.S. at 512, 514. Through RFRA, Congress reinstated the compelling governmental interest test eschewed by *Smith* by requiring that a generally applicable law placing a "substantial burden" on the free exercise of religion must be justified by a "compelling governmental interest" and must employ the "least restrictive means" of furthering that interest. 521 U.S. at 515-16.

[11] In holding that RFRA could not be justified as "appropriate" enforcement legislation under § 5, the Court emphasized that Congress' enforcement power is "remedial" in nature. *Id.* at 519. We recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Id.* at 518. We also noted, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited," *id.*, , and held that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation," *id.* at 519. Canvassing the history of the Fourteenth Amendment and case law examining the propriety of Congress' various voting rights measures,[5] the Court explained:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

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[5]See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Rome v. United States*, 446 U.S. 156 (1980).

Id. at 519-20. We thus held that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.

[12] RFRA failed to meet this test because there was little support in the record for the concerns that supposedly animated the law. And, unlike the measures in the voting rights cases, RFRA's provisions were "so out of proportion to a supposed remedial or preventive object" that it could not be understood "as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

[13] Can the Patent Remedy Act be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for patent owners? Following *City of Boerne*, we must first identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation "must be judged with reference to the historical experience . . . it reflects." *Id.* at 525. The underlying conduct at issue here is state infringement of patents and the use of sovereign immunity to deny patent owners compensation for the invasion of their patent rights. See H.R. Rep. No. 101-960, pt. 1, pp. 37-38 (1990) ("[P]atent owners are effectively denied a remedy for damages resulting from infringement by a State or State entity"); S. Rep. No. 102-280, p. 6 (1992) ("[P]laintiffs in patent infringement cases against a State are foreclosed from damages, regardless of the State conduct"). It is this conduct then — unremedied patent infringement by the States — that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act.

[14] In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases, Congress came up with little evidence of infringing conduct on the part of the States. The House Report acknowledged that "many states comply with patent law" and could provide only two examples of patent infringement suits against the States. See H.R. Rep. at 38. The Federal Circuit in its opinion identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990.

[15] Testimony before the House Subcommittee in favor of the bill acknowledged that "states are willing and able to respect patent rights. The fact that there are so few reported cases involving patent infringement claims against states underlies the point." Patent Remedy Clarification Act: Hearing on H.R. 3886 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 101st Cong., 2d Sess., 56 (1990) (hereinafter House Hearings) (statement of William S. Thompson); *id.* at 32 (statement of Robert Merges) ("[S]tates do occasionally find themselves in patent infringement suits"). Even the bill's sponsor conceded that "[w]e do not have any evidence of massive or widespread violation of patent laws by the States either with or without this State immunity." *Id.* at 22 (statement of Rep. Kastenmeier). The Senate Report, as well, contains no

evidence that unremedied patent infringement by States had become a problem of national import. At most, Congress heard testimony that patent infringement by States might increase in the future, see House Hearings 22 (statement of Jeffrey Samuels); *id.* at 36-37 (statement of Robert Merges); *id.* at 57 (statement of William Thompson), and acted to head off this speculative harm. See H.R. Rep. at 38.

[16] College Savings argues that by infringing a patent and then pleading immunity to an infringement suit, a State not only infringes the patent, but deprives the patentee of property without due process of law and "takes" the property in the patent without paying the just compensation required by the Fifth Amendment.[7] The United States declines to defend the Act as based on the Just Compensation Clause, but joins in College Savings' defense of the Act as designed to prevent a State from depriving a patentee of property without due process of law. College Savings contends that Congress may not invoke § 5 to protect property interests that it has created in the first place under Article 1. Patents, however, have long been considered a species of property. As such, they are surely included within the "property" of which no person may be deprived by a State without due process of law. And if the Due Process Clause protects patents, we know of no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment.

[17] Though patents may be considered "property" for purposes of our analysis, the legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act. The Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property, *without due process of law*." (Emphasis added.) This Court has accordingly held that "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis deleted).

[18] Thus, under the plain terms of the Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result. See *Parratt v. Taylor*, 451 U.S. 527, 539-31 (1981); *Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984); *id.* at 539 (O'CONNOR, J., concurring) ("[I]n challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate . . . . When adequate

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[7]There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment. Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

remedies are provided and followed, no . . . deprivation of property without due process can result").

[19] Congress, however, barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment. It did hear a limited amount of testimony to the effect that the remedies available in some States were uncertain.[8]

[20] The primary point made by these witnesses, however, was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law. See, *e.g.*, House Hearings, at 43 (statement of Robert Merges) ("[U]niformity again dictates that that sovereign immunity is a mistake in this field because of the variance among the State's laws"), *id.* at 34, 41 (Merges); *id.* at 58 (statement of William Thompson).[9]

[21] Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the

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[8]See, *e.g.*, House Hearings, 33 (statement of Robert Merges) ("Thus a patentee . . . would apparently have to draft her cause of action as a general tort claim — or perhaps one for restitution — to come within the statute. This might be impossible, or at least difficult under California law"); *id.* at 43 ("[I]t is true that you may have State remedies, alternative State remedies . . . . You could bring a deceit suit. You could try just a general unfair competition suit. A restitution is one that has occurred to me as a possible basis of recovery"); *id.* at 34 ("Another problem with this approach is that it assumes that such state law remedies will be available in every state in which the patentee's product is sold. This may or may not be true"); *id.* at 47 (statement of William Thompson) ("In this case there is no balance, since there are no — or at least there are not very effective patent remedies at the State level"); *id.* at 57 ("The court in *Lane* [*v. First Nat. Bank of Boston*, 687 F.Supp. 11 (D. Mass. 1988),] pointed out that the appellant may be able to obtain money damages by recourse to the Massachusetts tort claims act or sue the state for deceit, conversion, or unfair competition under Massachusetts law. The court also noted a Massachusetts statute which provides that damages may be recovered from the state when private property is confiscated for a public purpose. While many states may have similar statutes, the courts' surmise that intellectual property infringement cases may be pursued in some state courts offer us little comfort"); *id.* at 60 ("[I]t sounds to me like it is a very difficult area to predict what would happen. There is a rich variety of potential causes of action, as the prior speaker [Merges] pointed out").

[9]It is worth mentioning that the State of Florida provides remedies to patent owners for alleged infringement on the part of the State. Aggrieved parties may pursue a legislative remedy through a claims bill for payment in full, Fla. Stat. § 11.065, or a judicial remedy through a takings or conversion claim, see *Jacobs Wind Electric Co. v. Florida Dept. of Transp.*, 626 So.2d 1333 (Fla. 1993).

House Report, essentially repeating the testimony of the witnesses. See H.R. Rep., at 37, n. 158 ("[T]he availability of a State remedy is tenuous and could vary significantly State to State"); *id.* at 38 ("[I]f patentees turn to the State courts for alternative forms of relief from patent infringement, the result will be a patchwork of State laws, actually undermining the goal of national uniformity in our patent system"). The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.

[22] We have also said that a state actor's negligent act that causes unintended injury to a person's property does not "deprive" that person of property within the meaning of the Due Process Clause. See *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Actions predicated on direct patent infringement, however, do not require any showing of intent to infringe; instead, knowledge and intent are considered only with respect to damages. See 35 U.S.C. § 271(a); 5 D. Chisum, Patents § 16.02[2], p. 16-31 (rev. ed. 1998) ("It is, of course, elementary, that an infringement may be entirely inadvertent and unintentional and without knowledge of the patent"). Congress did not focus on instances of intentional or reckless infringement on the part of the States. Indeed, the evidence before Congress suggested that most state infringement was innocent or at worst negligent. See S. Rep. at 10 ("It is not always clear that with all the products that [government] buy[s], that anyone is really aware of the patent status of any particular invention or device or product"); H.R. Rep. at 39 ("[I]t should be very rare for a court to find . . . willful infringement on the part of a State or State agency"). Such negligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment.

[23] The legislative record thus suggests that the Patent Remedy Act does not respond to a history of "widespread and persisting deprivation of constitutional rights" of the sort Congress has faced in enacting proper prophylactic § 5 legislation. *City of Boerne*, 521 U.S. at 526. Instead, Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution. Though the lack of support in the legislative record is not determinative, identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *id.* at 530. Here, the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions.

[24] Because of this lack, the provisions of the Patent Remedy Act are "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. An unlimited range of state conduct would expose a State to claims of direct, induced, or contributory patent infringement, and the House Report itself cited testimony acknowledging "it[']s difficult for us to identify a patented product or process which might not be used by a state." H.R. Rep., at 38. Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of

the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

[25] Instead, Congress made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration. Our opinion in *City of Boerne* discussed with approval the various limits that Congress imposed in its voting rights measures, and noted that where "a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5," *id.* at 533. The Patent Remedy Act's indiscriminate scope offends this principle, and is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy. In sum, it simply cannot be said that "many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional." *Id.* at 532.

[26] The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment. The examples of States avoiding liability for patent infringement by pleading sovereign immunity in a federal-court patent action are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still. The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime.[11] These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.

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[11]See 35 U.S.C. § 271(h) (stating that States and state entities "shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity"); see also H.R. Rep., at 40 ("The Committee believes that the full panoply of remedies provided in the patent law should be available to patentees whose legitimate rights have been infringed by States or State entities"); S. Rep., at 14. Thus, contrary to the dissent's intimation, the Patent Remedy Act does not put States in the same position as the United States. Under the Patent Remedy Act, States are subject to all the remedies available to plaintiffs in infringement actions, which include punitive damages and attorney's fees, see 35 U.S.C. §§ 284, 285, as well as injunctive relief, see § 283. In waiving its own immunity from patent infringement actions in 28 U.S.C. § 1498(a), however, the United States did not consent to either treble damages or injunctive relief, and allowed reasonable attorney's fees only in a narrow class of specified instances.

[27] The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

[28] The Constitution vests Congress with plenary authority over patents and copyrights. Nearly 200 years ago, Congress provided for exclusive jurisdiction of patent infringement litigation in the federal courts. In 1992 Congress clarified that jurisdictional grant by an amendment to the patent law that unambiguously authorizes patent infringement actions against States, state instrumentalities, and any officer or employee of a State acting in his official capacity. Given the absence of effective state remedies for patent infringement by States and the statutory pre-emption of such state remedies, the 1992 Patent and Plant Variety Protection Remedy Clarification Act was an appropriate exercise of Congress' power under § 5 of the Fourteenth Amendment to prevent state deprivations of property without due process of law.

[29] This Court's recent decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), amply supports congressional authority to enact the Patent Remedy Act, whether one assumes that States seldom infringe patents, or that patent infringements potentially permeate an "unlimited range of state conduct." Before discussing *City of Boerne*, however, I shall comment briefly on the principle that undergirds all aspects of our patent system: national uniformity.

I

[In this part of his opinion, Justice Stevens then described the historical and theoretical rationale for uniform rules to govern patents.]

II

* * *

[30] The Court acknowledges, as it must, that patents are property. Every valid patent "gives the patentee or his assignee the exclusive right to make, use, and vend the invention or discovery for a limited period." *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 643 (1947). The Court suggests, however, that a State's infringement of a patent does not necessarily constitute a "deprivation" within the meaning of the Due Process Clause, because the infringement may be done negligently.

[31] As part of its attempt to stem the tide of prisoner litigation, and to avoid making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Daniels v. Williams*, 474 U.S. 327, 332-34 (1986), this

Court has drawn a constitutional distinction between negligent and intentional misconduct. Injuries caused by the mere negligence of state prison officials — in leaving a pillow on the stairs of the jail, for example — do not "deprive" anyone of liberty or property within the meaning of the Due Process Clause of that Amendment. *Id.* On the other hand, willful misconduct, and perhaps "recklessness or gross negligence," may give rise to such a deprivation. *Id.* at 334.

[32] While I disagree with the Court's assumption that this standard necessarily applies to deprivations of patent rights, the *Daniels* line of cases has only marginal relevance to this case: Respondent College Savings Bank has alleged that petitioner's infringement was willful. The question presented by this case, then, is whether the Patent Remedy Act, which clarified Congress' intent to subject state infringers to suit in federal court, may be applied to willful infringement.

[33] As I read the Court's opinion, its negative answer to that question has nothing to do with the facts of this case. Instead, it relies entirely on perceived deficiencies in the evidence reviewed by Congress before it enacted the clarifying amendment. "In enacting the Patent Remedy Act . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."

[34] It is quite unfair for the Court to strike down Congress' Act based on an absence of findings supporting a requirement this Court had not yet articulated. The legislative history of the Patent Remedy Act makes it abundantly clear that Congress was attempting to hurdle the then-most-recent barrier this Court had erected in the Eleventh Amendment course — the "clear statement" rule of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

[35] Nevertheless, Congress did hear testimony about inadequate state remedies for patent infringement when considering the Patent Remedy Act. The leading case referred to in the congressional hearing was *Chew v. California*, 893 F.2d 331 (Fed. Cir. 1990). In fact, *Chew* prompted Congress to consider the legislation that became the Patent Remedy Act. The Federal Circuit held in that case that congressional intent to abrogate state sovereign immunity under the patent laws was not "unmistakably clear," as this Court had required in *Atascadero*. *Chew*, 893 F.2d at 334.

[36] The facts of *Chew* clearly support both Congress' decision and authority to enact the Patent Remedy Act. Marian Chew had invented a method for testing automobile engine exhaust emissions and secured a patent on her discovery. Her invention was primarily used by States and other governmental entities. In 1987, Chew, an Ohio resident, sued the State of California in federal court for infringing her patent. California filed a motion to dismiss on Eleventh Amendment grounds, which the District Court granted. The Federal Circuit affirmed, expressly stating that the question whether Chew had a remedy under California law "is a question not before us." Nevertheless, it implied that its decision would have been the same even if Chew were left without any remedy. During its hearing on the Patent Remedy Act, Congress heard testimony about the *Chew* case. Professor Merges stated that Chew might not have been able to

draft her infringement suit as a tort claim. "This might be impossible, o[r] at least difficult, under California law. Consequently, relief under [state statutes] may be not be a true alternative avenue of recovery." House Hearing 33.

[37] Congress heard other general testimony that state remedies would likely be insufficient to compensate inventors whose patents had been infringed. The Acting Commissioner of Patents stated: "If States and their instrumentalities were immune from suit in federal court for patent infringement, patent holders would be forced to pursue uncertain, perhaps even non-existent, remedies under State law." *Id.* at 15. The legislative record references several cases of patent infringement involving States.

* * *

[38] It is true that, when considering the Patent Remedy Act, Congress did not review the remedies available in each State for patent infringements and surmise what kind of recovery a plaintiff might obtain in a tort suit in all 50 jurisdictions. But, it is particularly ironic that the Court should view this fact as support for its holding. Given that Congress had long ago pre-empted state jurisdiction over patent infringement cases, it was surely reasonable for Congress to assume that such remedies simply did not exist. Furthermore, it is well known that not all States have waived their sovereign immunity from suit, and among those States that have, the contours of this waiver vary widely.

* * *

IV

[39] For these reasons, I am convinced that the 1992 Act should be upheld even if full respect is given to the Court's recent cases cloaking the States with increasing protection from congressional legislation. I do, however, note my continuing dissent from the Court's aggressive sovereign immunity jurisprudence; today, this Court once again demonstrates itself to be the champion of States' rights. In this case, it seeks to guarantee rights the States themselves did not express any particular desire in possessing: during Congress' hearings on the Patent Remedy Act, although invited to do so, the States chose not to testify in opposition to the abrogation of their immunity.

[40] The statute that the Court invalidates today was only one of several "clear statements" that Congress enacted in response to the decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In each of those clarifications Congress was fully justified in assuming that it had ample authority to abrogate sovereign immunity defenses to federal claims, an authority that the Court squarely upheld in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). It was that holding — not just the "plurality opinion" — that was overruled in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The full reach of that case's dramatic expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by

the present majority's perception of constitutional penumbras rather than constitutional text. See *id.* at 54 (acknowledging "we have understood the Eleventh Amendment to stand not so much for what it says"). Until this expansive and judicially crafted protection of States' rights runs its course, I shall continue to register my agreement with the views expressed in the *Seminole* dissents and in the scholarly commentary on that case.

[41] I respectfully dissent.

[38-39] **Eleventh Amendment — Some Rules**

Please note: A summary like this is fallible and subject to change.

1. In general, no one may sue a state or an arm or instrumentality of a state (*e.g.*, the University of Kentucky) in federal court for any type of relief, particularly monetary relief arising from an accrued (retrospective) liability.

2. In general, no one may sue a state in *state court* on a federal cause of action. See *Alden v. Maine*, 527 U.S. 706 (1999). Aside: Even if one could sue a state in state court on a federal cause of action — in other words, even if *Alden v. Maine* had not been decided as it was — one still could not sue a state in state court (or anywhere else) under 42 U.S.C. § 1983 because this statute only authorizes suit against "persons," and the Court has held that a state is not a "person" for purposes of § 1983. This is true for arms of a state as well. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). But please note that a municipality *is* a "person" for purposes of § 1983. See *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

3. The list of plaintiffs who are subject to Rules (1) and (2) includes: (a) citizens of another state, see U.S. CONST. amend. XI; (b) citizens of the state itself, see *Hans v. Louisiana*, 134 U.S. 1 (1890); (c) citizens of other countries, see U.S. CONST. amend. XI; (d) other countries themselves, see *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); (e) Indian tribes, see *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); and (f) members of Indian tribes.

4. The United States (as such) may sue a state in federal court. See *United States v. Mississippi*, 380 U.S. 128 (1965). Note: Whether a *qui tam* suit, in which a plaintiff sues on behalf of the United States, falls within this exception is an open question that the Court avoided deciding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) by holding that the statute at issue in that case — the False Claims Act — did not make states suable.

5. A state may sue a state in federal court, provided the state sues on its own behalf, and not on behalf of a small group of citizens. See *Virginia v. West Virginia*, 206 U.S. 290 (1907) (Eleventh Amendment is *no bar* where one state sues another); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (Eleventh Amendment *is* a bar where one state sues another on behalf of a small group of citizens).

6. A state may be sued on a non-federal theory in its own courts, or in the courts of another state, see *Nevada v. Hall*, 440 U.S. 410 (1979), depending on the law of the forum. For a discussion of sovereign immunity under the law of Kentucky, see *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). Please note that the Supreme Court divided four-four on whether it should overrule *Nevada v. Hall* in *California Franchise Tax Board v. Hyatt*, 136 S. Ct. 1277 (2016). Applying the Full Faith and Credit Clause, however, the Court did hold in *Hyatt* that no state

court could award greater damages against another state than it could award against its own state in a comparable action.

7. A state may be "sued" in the Supreme Court when that Court exercises its appellate jurisdiction. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), recently reaffirmed in *South Central Bell v. Alabama*, 526 U.S. 160 (1999).

8. The Eleventh Amendment does not protect local government or other subdivisions of a state. See *Lincoln County v. Luning*, 133 U.S. 529 (1890). The original rationale for this rule seems to be that so-called "municipal corporations" were considered more akin to *private corporations* than to the *states* that authorized them to exist.

9. The line between a "subdivision" and an "arm" or "instrumentality" of a state is not always clear. In trying to figure this out, apply the "Pagan factors," which are derived from an article by John Pagan: (a) Would a judgment against the entity be satisfied with funds from the state's treasury? (b) Does the state government exert significant control over the entity's decisions and actions? (c) Does the state executive branch or legislature appoint the entity's policy-makers? (d) Does state law characterize the entity as an arm of the state? Affirmative answers to these questions will support a conclusion that the entity at issue is an arm or instrumentality, as opposed to a subdivision, of a state.

Professor Pagan's factors reflect the decisions in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the University of California v. Doe*, 519 U.S. 425 (1997). The Sixth Circuit elaborated on these decisions as follows in *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005):

> In deciding whether an entity is an "arm of the State" on the one hand or a "political subdivision" on the other[,] the Supreme Court has considered several factors: (1) the State's potential liability for a judgment against the entity, *Hess*, 513 U.S. at 51; (2) the language by which state statutes, *id.* at 44, and state courts, *id.* at 45, refer to the entity and the degree of state control and veto power over the entity's actions, *id.* at 44; (3) whether state or local officials appoint the board members of the entity, *id.*; and (4) whether the entity's functions fall within the traditional purview of state or local government, *id.* at 45. In discussing these factors, the Court has emphasized that the first factor — the liability of the State for a judgment — is the foremost factor, *id.* at 51, and that it is the state treasury's potential legal liability for the judgment, not whether the state treasury will pay for the judgment in that case, that controls the inquiry, see *Doe*, 519 U.S. at 431.

10. The Eleventh Amendment generally will not permit suit against a state officer where the judgment will run to the state treasury. See *Edelman v. Jordan*, 415 U.S. 651 (1974) (involving an action for "equitable restitution," which the Court construed as the functional equivalent of retrospective damages). A judgment does not "run to the state treasury," however,

if the state merely undertakes to indemnify an officer sued in his or her personal or individual capacity.

11. The Eleventh Amendment will generally permit an action in equity against a state officer in his or her official capacity to compel that officer to conform his or her behavior in the future to federal law. See *Ex parte Young*, 209 U.S. 123 (1908).

12. A plaintiff may also sue an officer of a state for declaratory relief in accordance with *Ex parte Young*. Indeed, the various opinions in *Wooley v. Maynard*, 430 U.S. 705(1977) seem to suggest that this is the course federal courts would prefer.

13. One can also obtain so-called "ancillary" relief in connection with an action under *Ex parte Young*. See *Quern v. Jordan*, 440 U.S. 332 (1979) (allowing "notice relief"); *Hutto v. Finney*, 437 U.S. 678 (1978) (allowing attorney's fees under 42 U.S.C. § 1988).

14. The rule that the Eleventh Amendment does not bar suit against state officers for prospective injunctive relief is true even though complying with such an order might be very expensive. See *Milliken v. Bradley*, 433 U.S. 267 (1977).

15. Suit under § 1983 against an officer of a state or of an instrumentality of a state for monetary damages in that officer's official capacity will not lie, because such a suit would be deemed a suit against the state or the instrumentality itself, and states and their instrumentalities are not "persons" under § 1983.

16. The denial of a claim of immunity under the Eleventh Amendment is immediately appealable. See *PRASA v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

17. One cannot obtain an injunction against state officers based on state law in federal court absent waiver. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). In this case, the Court held that the "stripping doctrine" of *Ex parte Young* applies only where necessary to protect federal rights. Aside: This rule has implications for *Pullman* abstention, at least in situations where the defendant is an officer of a state (as was the case in *Pullman* itself). Whereas, under *Pullman*, a plaintiff would present both federal and state grounds for equitable relief to the court, and the court would stay its hand on the federal issue while the state courts resolved the issue of unclear state law, *Pennhurst* would preclude the plaintiff from raising the state issue in federal court at all. If the plaintiff brought a simultaneous action in state court raising the state issue, perhaps the federal court would stay its proceedings in light of the proceedings in state court.

18. A state may expressly consent to suit in federal court. General waiver of sovereign immunity does not constitute a waiver of immunity arising from the Eleventh Amendment and related doctrines. At least to some extent, a state may be deemed to waive its

sovereign immunity under the federal Constitution by removing a case to federal court. See *Lapides v. Board of Regents*, 535 U.S. 613 (2002).

19. Constructive consent outside the context of a valid exercise of the conditional federal spending power is probably no longer possible. See *College Savings Bank v. Florida Prepaid*, 527 U.S. 666 (1999) (eliminating the basis for so-called "*Parden* waiver" and overruling *Parden*). The test for valid use of the conditional federal spending power is set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987). The five requirements for valid use of this power are: (a) the expenditure must be for the general welfare; (b) Congress must state unambiguously the condition upon which receipt of the funds depends; (c) there must be a conceptual relation between the purpose of the expenditure and the purpose of the condition; (d) Congress may not require states to violate the Constitution in order to receive federal funds; and (e) the amount of funding dependent upon satisfaction of the condition must not be so much that Congress coerces states rather than merely inducing them. The last component of *Dole* played a substantial role in the litigation over the constitutionality of the Affordable Care Act. See *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).

20. Congress generally may not unilaterally abrogate state sovereign immunity under the original, unamended Constitution. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), however, the Court held that states consented to abrogation of their immunity in the proposal and ratification of the original Constitution to the extent Congress exercises its power to "establish uniform Laws on the subject of Bankruptcies throughout the United States," U.S. CONST. art. I, § 8, cl. [4], and to the extent such abrogation is "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Katz*, 546 U.S. at 378.

21. Congress may unilaterally abrogate state sovereign immunity when it acts pursuant to the Reconstruction Amendments, see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (regarding Title VII of the Civil Rights Act of 1964, as amended), or when *Katz* applies.

22. To exercise the power recognized in *Fitzpatrick v. Bitzer*, Congress must explicitly and by clear language on the face of the statute at issue evince an intent to abrogate immunity under the Eleventh Amendment. See *Quern v. Jordan*, 440 U.S. 332 (1979) (no such intent shown regarding 42 U.S.C. § 1983).

23. The Court has significantly restricted Congress' power to enact legislation pursuant to the Reconstruction Amendments. The test for proper use of these powers is fairly stringent. For example, deprivations of property by states generally will not violate the Fourteenth Amendment unless the states systematically deprive people of property and fail to provide adequate redress. See *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999) (disallowing an action against a state for infringement of a patent). In a series of cases, the Court has held that Congress may only regulate conduct that does not *itself* violate the substantive provisions of the Fourteenth Amendment if it can establish "proportionality and congruence"

between the means it adopts and the evils it seeks to eradicate, *and* that Congress must establish an adequate basis for what it enacts. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress may not subject states and their subdivisions to suit under the Religious Freedom Restoration Act.); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Congress may not subject states to suit for violations of the Age Discrimination in Employment Act.); *University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Congress may not subject states to suit for violations of Title I of the Americans with Disabilities Act.); *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) (Congress may not subject states to suit for violations of 29 U.S.C. § 2612(a)(1)(D), a provision of the Family and Medical Leave Act.); but see *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (Congress may subject states to suit under 29 U.S.C. § 2612(a)(1)(C), another provision of the FMLA.). *Cf. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (Congress may not subject states to suit for violations of the false advertising provisions of the Lanham Act, because (among other things) the statutory right to be free from such advertising does not constitute "property" for purposes of due process.)

24. The mechanism of *Ex parte Young* is not available if Congress establishes an elaborate statutory procedure as an alternative to a direct action in equity against an officer of the state, under a rationale of *expressio unius est exclusio alterius*. See *Seminole*, 517 U.S. 44. Congress can avoid this result by stating in the statute that an action in accordance with *Ex parte Young* is still possible notwithstanding the procedure.

Eleventh Amendment — Problems

1. Polly, a citizen of the State of Cineplex, sues Daphne, an officer of an instrumentality of the state, in United States District Court for the District of Cineplex on a federal cause of action. Polly names Daphne in her official capacity. Polly seeks monetary damages from Daphne relating to a retrospective liability. The state has not waived its immunity under the federal Constitution. Specifically, Polly claims that Daphne has failed to adhere to the requirements of a federal spending program. The cause of action is predicated on a provision of the statute that sets up the spending program. Congress has *not* unambiguously required states receiving money under this program to waive their sovereign immunity under the federal Constitution. What result?

2. Penelope, a citizen of the State of Cineplex, sues Daria, an officer of an instrumentality of the state, in United States District Court for the District of Cineplex, on both federal and state causes of action. The federal cause of action is predicated on 42 U.S.C. § 1983. Specifically, Penelope claims that Daria is violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal Constitution, as well as comparable provisions of the state Constitution. Penelope sues Daria in her official capacity. Penelope seeks prospective injunctive and declaratory relief from Daria. Specifically, Penelope seeks an order compelling Daria to conform her behavior in the future to both federal and state law. The state has not waived any of its sovereign immunity under the federal Constitution. What result?

3. Perry, a citizen of the State of Cineplex, is a guard at Cineplex's main prison. He brings suit against the State of Cineplex in state court, arguing that the state has violated the federal Fair Labor Standards Act because it has failed to pay him a premium for time he has worked in excess of forty hours per week. This Act provides an express cause of action for Perry to sue the state in state or federal court, and it also expressly abrogates the state's sovereign immunity under the federal Constitution. Perry seeks back pay. The state has not waived any of its sovereign immunity under the federal Constitution. What result? What if Congress had predicated this statute (to the extent it applied to the states) at least in part on the Due Process Clause of the Fourteenth Amendment?

4. Patty, a citizen of the State of Cineplex, sues Dottie, a campus police officer who works for Cineplex City Community College, in the United States District Court for the District of Cineplex under 42 U.S.C. § 1983. Specifically, Patty claims that Dottie searched her car in violation of the Fourth and Fourteenth Amendments to the federal Constitution. Patty seeks monetary damages, and she sues Dottie in her individual capacity. The Community College will indemnify Dottie 100% for any monetary liability that arises in connection with her performance of official duties. The state has not waived any of its sovereign immunity under the federal Constitution. What result?

5. Demeter, the Attorney General of Cineplex, negligently causes an accident in Cineplex while driving to court on official business. Pleiades, a citizen of Cineplex, sustains injuries in the accident, and brings suit against Demeter in state court on a traditional state tort theory. The state has not waived any of its sovereign immunity under the federal Constitution. What result?

6. Peter, a citizen of the State of Bloomingdale, enters into a contract with the State of Cineplex, pursuant to which he agrees to provide 300,000 widgets to the state, and the state agrees to pay him $10 per widget. After Peter has delivered the 300,000 widgets, the legislature of the state resolves to pay him no more than $5 per widget, on the ground that the widgets are worth only $5 each. Peter brings suit in the United States District Court for the District of Cineplex against the state. Peter's suit contains two counts. The first count is an ordinary claim for breach of contract under state law. The second count is a claim that the state has made a law impairing an obligation of contract, in violation of the Contract Clause of the Constitution. This claim is predicated on a specific act of Congress that authorizes suit against states in federal court by private parties where states breach contractual obligations. The state has not waived any of its sovereign immunity under the federal Constitution. What result?

7. Pearl, a citizen of Cineplex and an accountant in the state's Division of Finance, believes she has been demoted because of her race. She brings suit under Title VII of the Civil Rights Act of 1964, as amended, in the United States District Court for the District of Cineplex, against the division and the state. She prays for reinstatement to her previous position, back pay, and attorney's fees. In Title VII, Congress explicitly abrogated state sovereign immunity from

suit in federal court. The state has not waived any of its sovereign immunity under the federal Constitution. What result?

8. Congress enacts a statute that requires states to negotiate in good faith with Indian tribes that wish to establish casinos on their land. Under the act, if a tribe believes that a state is not negotiating in good faith on this subject, it may seek review from an administrative law judge ("ALJ") in the U.S. Department of the Interior. Review of the ALJ's decision lies with a special board in the department, and final administrative review lies with the Secretary of the Interior him or herself. Judicial review of this process is available in federal court. In this act, Congress expressly abrogates any immunity a state may claim under the U.S. Constitution. The Cineplex Tribe brings suit in United States District Court for the District of Cineplex against the State and governor of Cineplex under this act, arguing that the state has failed to negotiate with it in good faith regarding the establishment of a casino on the tribe's property. The tribe seeks an order directing the state and the governor to negotiate on this matter in good faith. The state has not waived any of its immunity under the U.S. Constitution. What result?

9. Congress enacts a statute pursuant to which payments by a bankrupt shortly *before* bankruptcy commences are deemed "avoidable" and "recoverable" by the trustee in bankruptcy. Shortly before declaring bankruptcy, Pavel, a citizen of the State of Cineplex, transfers $100,000 to the University of Cineplex, an instrumentality of the state, in satisfaction of an antecedent debt. After Pavel declares bankruptcy, the trustee seeks to avoid and recover the transfer. The university claims immunity under the federal Constitution. The state has not waived any of its immunity under the federal Constitution. What result?

[40] **Scheuer v. Rhodes**
416 U.S. 232 (1974)

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

[1] We granted certiorari in these cases to resolve whether the District Court correctly dismissed civil damage actions, brought under 42 U.S.C. § 1983, on the ground that these actions were, as a matter of law, against the State of Ohio, and hence barred by the Eleventh Amendment to the Constitution and, alternatively, that the actions were against state officials who were immune from liability for the acts alleged in the complaints. These cases arise out of the same period of alleged civil disorder on the campus of Kent State University in Ohio during May 1970 . . . .

[2] In these cases the personal representatives of the estates of three students who died in that episode seek damages against the Governor, the Adjutant General, and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University. The complaints in both cases allege a cause of action under the Civil Rights Act of 1871, now 42 U.S.C. § 1983. Petitioner Scheuer also alleges a cause of action under Ohio law on the theory of pendent jurisdiction. Petitioners Krause and Miller make a similar claim, asserting jurisdiction on the basis of diversity of citizenship.

[3] The District Court dismissed the complaints for lack of jurisdiction over the subject matter on the theory that these actions, although in form against the named individuals, were, in substance and effect, against the State of Ohio and thus barred by the Eleventh Amendment. The Court of Appeals affirmed the action of the District Court, agreeing that the suit was in legal effect one against the State of Ohio and, alternatively, that the common-law doctrine of executive immunity barred action against the state officials who are respondents here. We are confronted with the narrow threshold question whether the District Court properly dismissed the complaints. We hold that dismissal was inappropriate at this stage of the litigation and accordingly reverse the judgments and remand for further proceedings. We intimate no view on the merits of the allegations since there is no evidence before us at this stage.

I

[4] The complaints in these cases are not identical but their thrust is essentially the same. In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken "under color of state law" and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.

[5] The complaints were dismissed by the District Court for lack of jurisdiction without the filing of an answer to any of the complaints. The only pertinent documentation before the court in addition to the complaints were two proclamations issued by the respondent Governor. The first proclamation ordered the Guard to duty to protect against violence arising from wildcat strikes in the trucking industry; the other recited an account of the conditions prevailing at Kent State University at that time. In dismissing these complaints for want of subject matter jurisdiction at that early stage, the District Court held, as we noted earlier, that the defendants were being sued in their official and representative capacities and that the actions were therefore in effect against the State of Ohio. The primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaints on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim.

* * *

II

[6] The Eleventh Amendment to the Constitution of the United States provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman v. Jordan*, 415 U.S. 651 (1974). Its applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte New York*, 256 U.S. 490, 500 (1921).

[7] However, since *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

> comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60 (emphasis supplied).

[8] *Ex parte Young*, like *Sterling v. Constantin*, 287 U.S. 378 (1932), involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman v. Jordan*, 415 U.S. 651, damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.

See generally *Monroe v. Pape*, 365 U.S. 167 (1961). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

[9] Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim — but have not yet established by proof — was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaints for lack of jurisdiction.

III

[10] The Court of Appeals relied upon the existence of an absolute "executive immunity" as an alternative ground for sustaining the dismissal of the complaints by the District Court. If the immunity of a member of the executive branch is absolute and comprehensive as to all acts allegedly performed within the scope of official duty, the Court of Appeals was correct; if, on the other hand, the immunity is not absolute but rather one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence. The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine — that the "King can do no wrong" — did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.[4] This official immunity apparently rested, in its genesis, on two mutually dependent

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[4]In England legislative immunity was secured after a long struggle, by the Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 W.&M., Sess. 2, c. 2. The English experience, of course, guided the drafters of our "Speech or Debate" Clause. See *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951).

In regard to judicial immunity, Holdsworth notes: "In the case of courts of record . . . it was held, certainly as early as Edward III's reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction." 6 W. Holdsworth, A History of English Law 235 (1927). The modern concept owes much to the elaboration and restatement of Coke and other judges of the sixteenth and early seventeenth centuries. The immunity of the Crown has traditionally been of a more limited nature. Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. The development of liability, especially during the times of the Tudors and Stuarts, was slow. With the accession of William and Mary,

rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

[11] In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial processes. The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session. This provision was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which had been secured in England in the Bill of Rights of 1689 and carried to the original Colonies. . . . . Immunity for the other two branches — long a creature of the common law — remained committed to the common law.

[12] Although the development of the general concept of immunity, and the mutations which the underlying rationale has undergone in its application to various positions[,] are not matters of immediate concern here, it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating "it is not a tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (dissenting opinion). Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity — absolute or qualified — for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. In *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959), the Court observed, in the somewhat parallel context of the privilege of public officers from defamation actions: "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government."

[13] For present purposes we need determine only whether there is an absolute immunity, as the Court of Appeals determined, governing the specific allegations of the complaint against the chief executive officer of a State, the senior and subordinate officers and enlisted personnel of that State's National Guard, and the president of a state-controlled university. If the immunity is qualified, not absolute, the scope of that immunity will necessarily

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the liability of officers saw what Jaffe has termed "a most remarkable and significant extension" in *Ashby v. White*, 1 Eng. Rep. 417 (H.L. 1704), reversing 87 Eng. Rep. 808 (Q.B. 1703). Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 14 (1963). See generally *Barr v. Matteo*, 360 U.S. 564 (1959). Good-faith performance of a discretionary duty has remained, it seems, a defense. See Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 216 (1963).

be related to facts as yet not established either by affidavits, admissions, or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983. In neither of these inquiries do we write on a clean slate. It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, 365 U.S. 167, MR. JUSTICE DOUGLAS, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172. Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171-72.

[14] Since the statute relied on thus included within its scope the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" *id.* at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe v. Pape*, the legislative history indicates that there is no absolute immunity. Soon after *Monroe v. Pape*, Mr. Chief Justice Warren noted in *Pierson v. Ray*, 386 U.S. 547 (1967), that the "legislative record [of § 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities," *id.* at 554. The Court had previously recognized that the Civil Rights Act of 1871 does not create civil liability for legislative acts by legislators "in a field where legislators traditionally have power to act." *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951). Noting that "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," *id.* at 372, the Court concluded that it was highly improbable that "Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language . . ." of this statute. *Id.* at 376.

[15] In similar fashion, *Pierson v. Ray*, 386 U.S. 547, examined the scope of judicial immunity under this statute. Noting that the record contained no "proof or specific allegation," 386 U.S. at 553, that the trial judge had "played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court," *id.*, the Court concluded that, had the Congress intended to abolish the common-law "immunity of judges for acts within the judicial role," *id.* at 554, it would have done so specifically. A judge's

> errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Id.

[16] The *Pierson* Court was also confronted with whether immunity was available to that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims under 1983 — the local police officer. . . . . The Court noted that the "common law has never granted police officers an absolute and unqualified immunity," but that "the prevailing view in this country [is that] a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved"; the Court went on to observe that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555. The Court then held that

> the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.

Id. at 557.

[17] When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices — whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions — is virtually infinite. In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act. When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. While both federal and state laws plainly contemplate the use of force when the necessity arises, the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights — government by elected civilian leaders, freedom of expression, of assembly, and of association. Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. . . . .

[18] These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they

reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. . . . .

* * *

IV

[19] These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here. The District Court acted before answers were filed and without any evidence other than the copies of the proclamations issued by respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that "mob rule existed at Kent State University." There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. We can readily grant that a declaration of emergency by the chief executive of a State is entitled to great weight but it is not conclusive.

* * *

[20] We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.

[21] The judgments of the Court of Appeals are reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the decision of these cases.

Notes on Scheuer

1. As you can see, the Eleventh Amendment is no bar to the plaintiffs' action against Governor Rhodes *et al.* This is because, as Chief Justice Burger explains, they are seeking monetary relief from the Governor and others in their *personal* or *individual* capacities. ("Personal" and "individual" are analytically the same capacity.) When a plaintiff sues a public servant in his or her *personal* or *individual* capacity (as opposed to his or her *official* capacity),

the Eleventh Amendment is not implicated. See ¶ [9]. Note as well that the presence or absence of *indemnity* is irrelevant to the applicability of the Eleventh Amendment, on the theory that indemnification is merely a contractual obligation that runs from the employer to the employee. It does not create liability from the government to the plaintiff.

2. The original text of § 1983, as enacted in 1871, recognized no explicit immunity for any category of defendant. Even today, the statute includes only the slimmest of explicit "immunities" — a provision that judges may not be sued for injunctive relief unless declaratory relief is unavailing or unavailable. Nevertheless, as Chief Justice Burger observes in *Scheuer*, the Court has read various forms of official immunity into the statute on the supposition that Congress would have expected the various immunities available to public servants at common law to be available in actions under § 1983. See ¶¶ [14]-[15].

3. There are two basic forms of immunity under § 1983, "absolute" and "qualified." If absolute immunity attaches, a defendant cannot be held liable under § 1983 under any circumstances — even in cases of egregious bad faith. If qualified immunity attaches, a defendant can only be held liable if he or she violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). (*Harlow* was itself a *Bivens* action, but the Court has held on many occasions that the standard for qualified immunity in actions under § 1983 is the same as for *Bivens* actions.)

4. Whether absolute or qualified immunity applies depends on the *function* that the defendant was discharging at the time of the alleged wrongful act, not on the title he or she held at the time. Thus, a *legislator* discharging a *legislative function* will enjoy *absolute immunity* from suit, but will enjoy only *qualified immunity* for *executive* or *administrative* functions. See generally *Tenney v. Brandhove*, 341 U.S. 367 (1951) (recognizing immunity for legislators under § 1983). Similarly, a *judge* discharging a *judicial function* will enjoy *absolute immunity* from suit, but will enjoy only *qualified immunity* for *executive* or *administrative* functions. See generally *Pierson v. Ray*, 386 U.S. 547 (1967) (recognizing immunity for judges under § 1983). Finally, an *executive* or *administrative* officer will enjoy *qualified immunity* for the discharge of an *executive* or *administrative* function, but will instead enjoy *absolute immunity* for *quasi-legislative* or *quasi-judicial* functions.

5. As of *Scheuer*, the standard for qualified immunity contained both an objective and a subjective component. See ¶ [18] (emphasis and bracketed language added):

> It is the existence of *reasonable grounds for the belief* formed at the time and in light of all the circumstances [objective component], coupled with good-faith belief [subjective component], that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

The Court later eliminated the subjective component of qualified immunity, on the theory that it led to onerous discovery, including lengthy depositions of defendants, and that it rendered summary judgment virtually impossible for defendants to obtain. This (largely) took place in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), where the Court (per Justice Powell) wrote that:

> [B]are 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.

Id. at 817-18. Even this language did not entirely close the door to a subjective analysis. (To wit — what if a plaintiff made something more than a "bare allegation[] of malice"?) The Court resolved this issue conclusively in *Crawford-El v. Britton*, 523 U.S. 574 (1998). As the Court (per Justice Scalia) wrote in that case, "[u]nder [the] standard [of *Harlow v. Fitzgerald*], a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El*, 523 U.S. at 588.

You should be mindful of one interesting wrinkle with respect to subjective motivation, however. Although the *defense* of qualified immunity has no subjective component, some constitutional claims include such a component as part of the plaintiff's *case-in-chief*. For example, to make out a claim for retaliatory discharge in violation of the First Amendment, a plaintiff must establish that the defendant *intended* to retaliate for the exercise of expressive rights. Similarly, a plaintiff must establish *intent* to discriminate to make out a claim for denial of equal protection. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). In cases like these, plaintiffs are permitted to take evidence in support of their claims, although they will of course have to satisfy the standards of pleading set forth in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009).

6. The level of immunity for prosecutors can be difficult to ascertain because prosecutors wear two very different hats. Sometimes, they are legal advisors to the police, in which case they enjoy only qualified immunity. Other times, however, they are officers of the court, in which case they enjoy absolute immunity because they are discharging a quasi-judicial function. In *Burns v. Reed*, 500 U.S. 478 (1991), for example, the Court held that absolute immunity applied to a prosecutor's alleged subornation of false testimony in a hearing to obtain a warrant, *id.* at 487, but only qualified immunity applied to the same prosecutor's advice to the police that they should hypnotize a suspect in order to obtain information from her, *id.* at 496.

7. Witnesses sued under § 1983 enjoy absolute immunity, on the grounds that testifying is part of the judicial process. See *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witness at trial); *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (witness before grand jury).

8. If a federal court denies a motion for summary judgment on the ground of qualified immunity in a 1983 case, its decision is immediately appealable. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (a *Bivens* case announcing this rule). The rationale for this holding is that official immunity is intended to protect defendants from both liability and the rigors of trial. Denial of such a motion in a 1983 action in *state court* depends on the state's own rules of appellate procedure. See *Johnson v. Fankell*, 520 U.S. 911, 522-23 (1997).

Please note, however, that some grounds for denial of summary judgment — even in federal court — may not provide the basis for immediate appeal. In particular, if a federal court rejects official immunity on the ground that the law was "clearly established" when the defendant acted, immediate appeal will be available. If, however, a federal court rejects summary judgment because a genuine issue of a "real" fact remains — *e.g.*, whether a door was open — immediate appeal may not be available because courts of appeals are not equipped to resolve such disputes. See generally *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (broadly raising this issue).

9. At least some *private citizens* who are deemed to act "under color of law" and therefore are amenable to suit under § 1983 as state actors enjoy no immunity whatsoever. In *Wyatt v. Cole*, 504 U.S. 158 (1992), for example, the Court denied qualified immunity to a rancher and his attorney after they exercised replevin through a local sheriff to seize property (including 24 head of cattle and a tractor) from a former commercial partner. The Court justified its decision on the ground that official immunity exists largely to protect public servants who have to choose between doing their jobs and avoiding liability. "Unlike [public servants]," wrote Justice O'Connor, "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." *Id.* at 168. In *Filarsky v. Delia*, 566 U.S. 377 (2012), however, the Court held that a private attorney retained by a city to conduct an internal investigation enjoyed qualified immunity, on the ground that "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 387.

10. In practical terms, the standard for rejecting qualified immunity is actually quite high. As Justice Scalia observed, for the Court, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the right that any given public servant is said to have violated must be "particularized" to the facts and circumstances of the actual case. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," he went on to write, "but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640. The issue in *Anderson* was whether a specific situation presented probable cause and exigent circumstances such that a federal agent and others could conduct a warrantless search of a home. See *id.* at 637.

[41] **City of St. Louis v. Praprotnik**
485 U.S. 112 (1988)

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join.

[1] This case calls upon us to define the proper legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U.S.C. § 1983.

I

[2] The principal facts are not in dispute. Respondent James H. Praprotnik is an architect who began working for petitioner city of St. Louis in 1968. For several years, respondent consistently received favorable evaluations of his job performance, uncommonly quick promotions, and significant increases in salary. By 1980, he was serving in a management-level city planning position at petitioner's Community Development Agency.

[3] The Director of CDA, Donald Spaid, had instituted a requirement that the agency's professional employees, including architects, obtain advance approval before taking on private clients. Respondent and other CDA employees objected to the requirement. In April 1980, respondent was suspended for 15 days by CDA's Director of Urban Design, Charles Kindleberger, for having accepted outside employment without prior approval. Respondent appealed to the city's Civil Service Commission, a body charged with reviewing employee grievances. Finding the penalty too harsh, the Commission reversed the suspension, awarded respondent backpay, and directed that he be reprimanded for having failed to secure a clear understanding of the rule.

[4] The Commission's decision was not well received by respondent's supervisors at CDA. Kindleberger later testified that he believed respondent had lied to the Commission, and that Spaid was angry with respondent.

[5] Respondent's next two annual job performance evaluations were markedly less favorable than those in previous years. In discussing one of these evaluations with respondent, Kindleberger apparently mentioned his displeasure with respondent's 1980 appeal to the Civil Service Commission. Respondent appealed both evaluations to the Department of Personnel. In each case, the Department ordered partial relief and was upheld by the city's Director of Personnel or the Civil Service Commission.

[6] In April 1981, a new Mayor came into office, and Donald Spaid was replaced as Director of CDA by Frank Hamsher. As a result of budget cuts, a number of layoffs and transfers significantly reduced the size of CDA and of the planning section in which respondent worked. Respondent, however, was retained.

[7] In the spring of 1982, a second round of layoffs and transfers occurred at CDA. At that time, the city's Heritage and Urban Design Commission was seeking approval to hire someone who was qualified in architecture and urban planning. Hamsher arranged with the Director of Heritage, Henry Jackson, for certain functions to be transferred from CDA to Heritage. This arrangement, which made it possible for Heritage to employ a relatively high-level "city planning manager," was approved by Jackson's supervisor, Thomas Nash. Hamsher then transferred respondent to Heritage to fill this position.

[8] Respondent objected to the transfer, and appealed to the Civil Service Commission. The Commission declined to hear the appeal because respondent had not suffered a reduction in his pay or grade. Respondent then filed suit in Federal District Court, alleging that the transfer was unconstitutional. The city was named as a defendant, along with Kindleberger, Hamsher, Jackson (whom respondent deleted from the list before trial), and Deborah Patterson, who had succeeded Hamsher at CDA.

[9] At Heritage, respondent became embroiled in a series of disputes with Jackson and Jackson's successor, Robert Killen. Respondent was dissatisfied with the work he was assigned, which consisted of unchallenging clerical functions far below the level of responsibilities that he had previously enjoyed. At least one adverse personnel decision was taken against respondent, and he obtained partial relief after appealing that decision.

[10] In December 1983, respondent was laid off from Heritage. The layoff was attributed to a lack of funds, and this apparently meant that respondent's supervisors had concluded that they could create two lower level positions with the funds that were being used to pay respondent's salary. Respondent then amended the complaint in his lawsuit to include a challenge to the layoff. He also appealed to the Civil Service Commission, but proceedings in that forum were postponed because of the pending lawsuit and have never been completed.

[11] The case went to trial on two theories: (1) that respondent's First Amendment rights had been violated through retaliatory actions taken in response to his appeal of his 1980 suspension; and (2) that respondent's layoff from Heritage was carried out for pretextual reasons in violation of due process. The jury returned special verdicts exonerating each of the three individual defendants, but finding the city liable under both theories. Judgment was entered on the verdicts, and the city appealed.

[12] A panel of the Court of Appeals for the Eighth Circuit found that the due process claim had been submitted to the jury on an erroneous legal theory and vacated that portion of the judgment. With one judge dissenting, however, the panel affirmed the verdict holding the city liable for violating respondent's First Amendment rights. Only the second of these holdings is challenged here.

[13] The Court of Appeals found that the jury had implicitly determined that respondent's layoff from Heritage was brought about by an unconstitutional city policy.

Applying a test under which a "policymaker" is one whose employment decisions are "final" in the sense that they are not subjected to *de novo* review by higher ranking officials, the Court of Appeals concluded that the city could be held liable for adverse personnel decisions taken by respondent's supervisors. In response to petitioner's contention that the city's personnel policies are actually set by the Civil Service Commission, the Court of Appeals concluded that the scope of review before that body was too "highly circumscribed" to allow it fairly to be said that the Commission, rather than the officials who initiated the actions leading to respondent's injury, were the "final authority" responsible for setting city policy.

[14] Turning to the question whether a rational jury could have concluded that respondent had been injured by an unconstitutional policy, the Court of Appeals found that respondent's transfer from CDA to Heritage had been "orchestrated" by Hamsher, that the transfer had amounted to a "constructive discharge," and that the injury had reached fruition when respondent was eventually laid off by Nash and Killen. The court held that the jury's verdict exonerating Hamsher and the other individual defendants could be reconciled with a finding of liability against the city because "the named defendants were not the supervisors directly causing the lay off, when the actual damages arose."

[15] The dissenting judge relied on our decision in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). He found that the power to set employment policy for petitioner city of St. Louis lay with the Mayor and Aldermen, who were authorized to enact ordinances, and with the Civil Service Commission, whose function was to hear appeals from city employees who believed that their rights under the city's Charter, or under applicable rules and ordinances, had not been properly respected. The dissent concluded that respondent had submitted no evidence proving that the Mayor and Aldermen, or the Commission, had established a policy of retaliating against employees for appealing from adverse personnel decisions. The dissenting judge also concluded that, even if there were such a policy, the record evidence would not support a finding that respondent was in fact transferred or laid off in retaliation for the 1980 appeal from his suspension.

[16] We granted certiorari, and we now reverse.

* * *

III

A

[17] Section 1 of the Ku Klux Act of 1871, as amended, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State[,] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

> of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[18] Ten years ago, this Court held that municipalities and other bodies of local government are "persons" within the meaning of this statute. Such a body may therefore be sued directly if it is alleged to have caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). The Court pointed out that 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-91. At the same time, the Court rejected the use of the doctrine of *respondeat superior* and concluded that municipalities could be held liable only when an injury was inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694.

[19] *Monell*'s rejection of *respondeat superior*, and its insistence that local governments could be held liable only for the results of unconstitutional governmental "policies," arose from the language and history of § 1983. For our purposes here, the crucial terms of the statute are those that provide for liability when a government "subjects [a person], or causes [that person] to be subjected," to a deprivation of constitutional rights. Aware that governmental bodies can act only through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights. Reading the statute's language in the light of its legislative history, the Court found that vicarious liability would be incompatible with the causation requirement set out on the face of § 1983. That conclusion, like decisions that have widened the scope of 1983 by recognizing constitutional rights that were unheard of in 1871, has been repeatedly reaffirmed. See, *e.g.*, *Owen v. City of Independence*, 445 U.S. 622, 633, 655, n.39 (1980); *Pembaur v. Cincinnati*, 475 U.S. at 478-80 & nn.7-8.

[20] In *Monell* itself, it was undisputed that there had been an official policy requiring city employees to take actions that were unconstitutional under this Court's decisions. Without attempting to draw the line between actions taken pursuant to official policy and the independent actions of employees and agents, the *Monell* Court left the "full contours" of municipal liability under § 1983 to be developed further on "another day." 436 U.S. at 695.

[21] In the years since *Monell* was decided, the Court has considered several cases involving isolated acts by government officials and employees. We have assumed that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business. See, *e.g.*, *Owen v. City of Independence*, 445 U.S. 622; *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). *Cf. Pembaur*, 475 U.S. at 480. At the other end of the spectrum, we have held that an unjustified shooting by a police officer cannot, without more, be thought to result from official

policy. *Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion); *id.* at 830-31 & n.5 (BRENNAN, J., concurring in part and concurring in judgment).

[22] Two Terms ago, in *Pembaur*, 475 U.S. 469, we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the Court was unable to settle on a general formulation, JUSTICE BRENNAN's opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 480. Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Id.* at 483 (plurality opinion). Third, whether a particular official has "final policymaking authority" is a question of *state law*. *Id.* (plurality opinion). Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business. *Id.* at 482-83 & n.12 (plurality opinion).

[23] The Courts of Appeals have already diverged in their interpretations of these principles. Today, we set out again to clarify the issue that we last addressed in *Pembaur*.

B

[24] We begin by reiterating that the identification of policymaking officials is a question of state law. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." *Pembaur v. Cincinnati*, 475 U.S. at 483 (plurality opinion).[1] Thus the identification of policymaking officials is not a question of federal law, and it is not a question of fact in the usual sense. The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies. Without attempting to canvass the numberless factual scenarios that

[1]Unlike JUSTICE BRENNAN, we would not replace this standard with a new approach in which state law becomes merely an "appropriate starting point" for an "assessment of a municipality's actual power structure." Municipalities cannot be expected to predict how courts or juries will assess their "actual power structures," and this uncertainty could easily lead to results that would be hard in practice to distinguish from the results of a regime governed by the doctrine of *respondeat superior*. It is one thing to charge a municipality with responsibility for the decisions of officials invested by law, or by a "custom or usage" having the force of law, with policymaking authority. It would be something else, and something inevitably more capricious, to hold a municipality responsible for every decision that is perceived as "final" through the lens of a particular factfinder's evaluation of the city's "actual power structure."

may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.[2]

[25] We are not, of course, predicting that state law will always speak with perfect clarity. We have no reason to suppose, however, that federal courts will face greater difficulties here than those that they routinely address in other contexts. We are also aware that there will be cases in which policymaking responsibility is shared among more than one official or body. In the case before us, for example, it appears that the Mayor and Aldermen are authorized to adopt such ordinances relating to personnel administration as are compatible with the City Charter. The Civil Service Commission, for its part, is required to "prescribe . . . rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith." Assuming that applicable law does not make the decisions of the Commission reviewable by the Mayor and Aldermen, or vice versa, one would have to conclude that policy decisions made either by the Mayor and Aldermen or by the Commission would be attributable to the city itself. In any event, however, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself.

[26] As the plurality in *Pembaur* recognized, special difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official. If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability. If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose. It may not be

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[2]JUSTICE STEVENS, who believes that *Monell* incorrectly rejected the doctrine of *respondeat superior*, suggests a new theory that reflects his perceptions of the congressional purposes underlying § 1983. This theory would apparently ignore state law, and distinguish between "high" officials and "low" officials on the basis of an independent evaluation of the extent to which a particular official's actions have "the potential of controlling governmental decisionmaking," or are "perceived as the actions of the city itself." Whether this evaluation would be conducted by judges or juries, we think the legal test is too imprecise to hold much promise of consistent adjudication or principled analysis. We can see no reason, except perhaps a desire to come as close as possible to *respondeat superior* without expressly adopting that doctrine, that could justify introducing such unpredictability into a body of law that is already so difficult.

* * *

possible to draw an elegant line that will resolve this conundrum, but certain principles should provide useful guidance.

[27] First, whatever analysis is used to identify municipal policymakers, egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded by a separate doctrine. Relying on the language of § 1983, the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970). That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited.

[28] Second, as the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

C

[29] Whatever refinements of these principles may be suggested in the future, we have little difficulty concluding that the Court of Appeals applied an incorrect legal standard in this case. In reaching this conclusion, we do not decide whether the First Amendment forbade the city to retaliate against respondent for having taken advantage of the grievance mechanism in 1980. Nor do we decide whether there was evidence in this record from which a rational jury could conclude either that such retaliation actually occurred or that respondent suffered any compensable injury from whatever retaliatory action may have been taken. Finally, we do not address petitioner's contention that the jury verdict exonerating the individual defendants cannot be reconciled with the verdict against the city. Even assuming that all these issues were properly resolved in respondent's favor, we would not be able to affirm the decision of the Court of Appeals.

[30] The city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipal policy. Respondent does not contend that anyone in city government ever promulgated, or even articulated, such a policy. Nor did he attempt to prove that such retaliation was ever directed against anyone other than himself. Respondent contends that the record can be read to establish that his supervisors were angered by his 1980 appeal to the Civil Service Commission; that new supervisors in a new administration chose, for reasons passed on through some informal means, to retaliate against respondent two years later by

transferring him to another agency; and that this transfer was part of a scheme that led, another year and a half later, to his layoff. Even if one assumes that all this was true, it says nothing about the actions of those whom the law established as the makers of municipal policy in matters of personnel administration. The Mayor and Aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees. On the contrary, the city established an independent Civil Service Commission and empowered it to review and correct improper personnel actions. Respondent does not deny that his repeated appeals from adverse personnel decisions repeatedly brought him at least partial relief, and the Civil Service Commission never so much as hinted that retaliatory transfers or layoffs were permissible. Respondent points to no evidence indicating that the Commission delegated to anyone its final authority to interpret and enforce the following policy set out in Article XVIII of the city's Charter, 2(a), App. 49:

> Merit and fitness. All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness . . . .

[31] The Court of Appeals concluded that "appointing authorities," like Hamsher and Killen, who had the authority to initiate transfers and layoffs, were municipal "policymakers." The court based this conclusion on its findings (1) that the decisions of these employees were not individually reviewed for "substantive propriety" by higher supervisory officials; and (2) that the Civil Service Commission decided appeals from such decisions, if at all, in a circumscribed manner that gave substantial deference to the original decisionmaker. We find these propositions insufficient to support the conclusion that Hamsher and Killen were authorized to establish employment policy for the city with respect to transfers and layoffs. To the contrary, the City Charter expressly states that the Civil Service Commission has the power and the duty:

> To consider and determine any matter involved in the administration and enforcement of this [Civil Service] article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director [of personnel], or on appeal by any appointing authority, employe, or taxpayer of the city, from any act of the director or of any appointing authority. The decision of the commission in all such matters shall be final, subject, however, to any right of action under any law of the state or of the United States.

St. Louis City Charter, Art. XVIII, 7(d), App. 63.

[32] . . . . A majority of the Court of Appeals panel determined that the Civil Service Commission's review of individual employment actions gave too much deference to the decisions of appointing authorities like Hamsher and Killen. Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. It is equally consistent with a presumption that the subordinates are

faithfully attempting to comply with the policies that are supposed to guide them. It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower ranking official. But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. In such circumstances, the purposes of § 1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy.

[33] JUSTICE BRENNAN's opinion, concurring in the judgment, finds implications in our discussion that we do not think necessary or correct. We nowhere say or imply, for example, that "a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts inconsistent with that policy." Rather, we would respect the decisions, embodied in state and local law, that allocate policymaking authority among particular individuals and bodies. Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced. If such a showing were made, we would be confronted with a different case than the one we decide today.

[34] Nor do we believe that we have left a "gaping hole" in § 1983 that needs to be filled with the vague concept of "*de facto* final policymaking authority." Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior*, ad hoc searches for officials possessing such "*de facto*" authority would serve primarily to foster needless unpredictability in the application of § 1983.

IV

[35] We cannot accept either the Court of Appeals' broad definition of municipal policymakers or respondent's suggestion that a jury should be entitled to define for itself which officials' decisions should expose a municipality to liability. Respondent has suggested that the record will support an inference that policymaking authority was in fact delegated to individuals who took retaliatory action against him and who were not exonerated by the jury. Respondent's arguments appear to depend on a legal standard similar to the one suggested in JUSTICE STEVENS' dissenting opinion, which we do not accept. Our examination of the record and state law, however, suggests that further review of this case may be warranted in light of the principles we have discussed. That task is best left to the Court of Appeals, which will be free to invite additional briefing and argument if necessary. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

[36] Despite its somewhat confusing procedural background, this case at bottom presents a relatively straightforward question: whether respondent's supervisor at the Community Development Agency, Frank Hamsher, possessed the authority to establish final employment policy for the city of St. Louis such that the city can be held liable under 42 U.S.C. § 1983 for Hamsher's allegedly unlawful decision to transfer respondent to a dead-end job. Applying the test set out two Terms ago by the plurality in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), I conclude that Hamsher did not possess such authority and I therefore concur in the Court's judgment reversing the decision below. I write separately, however, because I believe that the commendable desire of today's plurality to "define more precisely when a decision on a single occasion may be enough" to subject a municipality to § 1983 liability has led it to embrace a theory of municipal liability that is both unduly narrow and unrealistic, and one that ultimately would permit municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers.

* * *

II

* * *

[37] In my view, *Pembaur* controls this case. As an "appointing authority," Hamsher was empowered under the City Charter to initiate lateral transfers such as the one challenged here, subject to the approval of both the Director of Personnel and the appointing authority of the transferee agency. The Charter, however, nowhere confers upon agency heads any authority to establish city *policy*, final or otherwise, with respect to such transfers. Thus, for example, Hamsher was not authorized to promulgate binding guidelines or criteria governing how or when lateral transfers were to be accomplished. Nor does the record reveal that he in fact sought to exercise any such authority in these matters. There is no indication, for example, that Hamsher ever purported to institute or announce a practice of general applicability concerning transfers. Instead, the evidence discloses but one transfer decision — the one involving respondent — which Hamsher ostensibly undertook pursuant to a citywide program of fiscal restraint and budgetary reductions. At most, then, the record demonstrates that Hamsher had the authority to determine how best to *effectuate* a policy announced by his superiors, rather than the power to *establish* that policy. [Thus,] Hamsher had discretionary authority to transfer CDA employees laterally; that he may have used this authority to punish respondent for the exercise of his First Amendment rights does not, without more, render the city liable for respondent's resulting constitutional injury. The court below did not suggest that either Killen or Nash, who together orchestrated respondent's ultimate layoff, shared Hamsher's constitutionally impermissible

animus. Because the court identified only one unlawfully motivated municipal employee involved in respondent's transfer and layoff, and because that employee did not possess final policymaking authority with respect to the contested decision, the city may not be held accountable for any constitutional wrong respondent may have suffered.

III

[38] These determinations, it seems to me, are sufficient to dispose of this case, and I therefore think it unnecessary to decide, as the plurality does, who the actual policymakers in St. Louis are. I question more than the mere necessity of these determinations, however, for I believe that in the course of passing on issues not before us, the plurality announces legal principles that are inconsistent with our earlier cases and unduly restrict the reach of § 1983 in cases involving municipalities.

[39] The plurality begins its assessment of St. Louis' power structure by asserting that the identification of policymaking officials is a question of state law, by which it means that the question is neither one of federal law nor of fact, at least "not . . . in the usual sense." Instead, the plurality explains, courts are to identify municipal policymakers by referring exclusively to applicable state statutory law. Not surprisingly, the plurality cites no authority for this startling proposition, nor could it, for we have never suggested that municipal liability should be determined in so formulaic and unrealistic a fashion. In any case in which the policymaking authority of a municipal tortfeasor is in doubt, state law will naturally be the appropriate starting point, but ultimately the factfinder must determine where such policymaking authority actually resides, and not simply "where the applicable law purports to put it." As the plurality itself acknowledges, local governing bodies may take myriad forms. We in no way slight the dignity of municipalities by recognizing that in not a few of them real and apparent authority may diverge, and that in still others state statutory law will simply fail to disclose where such authority ultimately rests. Indeed, in upholding the Court of Appeals' determination in *Pembaur* that the County Prosecutor was a policymaking official with respect to county law enforcement practices, a majority of this Court relied on testimony which revealed that the County Sheriff's office routinely forwarded certain matters to the Prosecutor and followed his instructions in those areas. While the majority splintered into three separate camps on the ultimate theory of municipal liability, and the case generated five opinions in all, not a single Member of the Court suggested that reliance on such extrastatutory evidence of the county's actual allocation of policymaking authority was in any way improper. Thus, although I agree with the plurality that juries should not be given open-ended "*discretion* to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself" (emphasis added), juries can and must find the predicate facts necessary to a determination whether a given official possesses final policymaking authority. While the jury instructions in this case were regrettably vague, the plurality's solution tosses the baby out with the bath water. The identification of municipal policymakers is an essentially factual determination "in the usual sense," and is therefore rightly entrusted to a properly instructed jury.

[40] Nor does the "custom or usage" doctrine adequately compensate for the inherent inflexibility of a rule that leaves the identification of policymakers exclusively to state statutory law. That doctrine, under which municipalities and States can be held liable for unconstitutional practices so well settled and permanent that they have the force of law, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970), has little if any bearing on the question whether a city has delegated *de facto* final policymaking authority to a given official. A city practice of delegating final policymaking authority to a subordinate or mid-level official would not be unconstitutional in and of itself, and an isolated unconstitutional act by an official entrusted with such authority would obviously not amount to a municipal "custom or usage." Under *Pembaur*, of course, such an isolated act *should* give rise to municipal liability. Yet a case such as this would fall through the gaping hole the plurality's construction leaves in § 1983, because state statutory law would not identify the municipal actor as a policymaking official, and a single constitutional deprivation, by definition, is not a well-settled and permanent municipal practice carrying the force of law.

[41] For these same reasons, I cannot subscribe to the plurality's narrow and overly rigid view of when a municipal official's policymaking authority is "final." Attempting to place a gloss on *Pembaur*'s finality requirement, the plurality suggests that whenever the decisions of an official are subject to some form of review — however limited — that official's decisions are nonfinal. Under the plurality's theory, therefore, even where an official wields policymaking authority with respect to a challenged decision, the city would not be liable for that official's policy decision unless *reviewing* officials affirmatively approved both the "decision and the basis for it." Reviewing officials, however, may as a matter of practice never invoke their plenary oversight authority, or their review powers may be highly circumscribed. Under such circumstances, the subordinate's decision is in effect the final municipal pronouncement on the subject. Certainly a § 1983 plaintiff is entitled to place such considerations before the jury, for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power structure is necessarily a factual and practical one.

[42] Accordingly, I cannot endorse the plurality's determination, based on nothing more than its own review of the City Charter, that the Mayor, the Aldermen, and the CSC are the only policymakers for the city of St. Louis. While these officials may well have policymaking authority, that hardly ends the matter; the question before us is whether the officials responsible for respondent's allegedly unlawful transfer were final policymakers. As I have previously indicated, I do not believe that CDA Director Frank Hamsher possessed any policymaking authority with respect to lateral transfers and thus I do not believe that his allegedly improper decision to transfer respondent could, without more, give rise to municipal liability. Although the plurality reaches the same result, it does so by reasoning that because others could have reviewed the decisions of Hamsher and Killen, the latter officials simply could not have been final policymakers.

[43] This analysis, however, turns a blind eye to reality, for it ignores not only the lower court's determination, nowhere disputed, that CSC review was highly circumscribed and deferential, but also the fact that in this very case the CSC *refused* to judge the propriety of Hamsher's transfer decision because a lateral transfer was not an "adverse" employment action falling within its jurisdiction. Nor does the plurality account for the fact that Hamsher's predecessor, Donald Spaid, promulgated what the city readily acknowledges was a binding policy regarding secondary employment; although the CSC ultimately modified the sanctions respondent suffered as a result of his apparent failure to comply with that policy, the record is devoid of any suggestion that the CSC reviewed the substance or validity of the policy itself. Under the plurality's analysis, therefore, even the hollowest promise of review is sufficient to divest all city officials save the mayor and governing legislative body of final policymaking authority. While clarity and ease of application may commend such a rule, we have remained steadfast in our conviction that Congress intended to hold municipalities accountable for those constitutional injuries inflicted not only by their lawmakers, but also "by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. Because the plurality's mechanical "finality" test is fundamentally at odds with the pragmatic and factual inquiry contemplated by *Monell*, I cannot join what I perceive to be its unwarranted abandonment of the traditional factfinding process in § 1983 actions involving municipalities.

* * *

IV

[44] For the reasons stated above, I concur in the judgment of the Court reversing the decision below and remanding the case so that the Court of Appeals may determine whether respondent's layoff resulted from the actions of any improperly motivated final policymakers.

JUSTICE STEVENS, dissenting.

[45] If this case involved nothing more than a personal vendetta between a municipal employee and his superiors, it would be quite wrong to impose liability on the city of St. Louis. In fact, however, the jury found that top officials in the city administration, relying on pretextual grounds, had taken a series of retaliatory actions against respondent because he had testified truthfully on two occasions, one relating to personnel policy and the other involving a public controversy of importance to the Mayor and the members of his cabinet. No matter how narrowly the Court may define the standards for imposing liability upon municipalities in § 1983 litigation, the judgment entered by the District Court in this case should be affirmed.

[46] In order to explain why I believe that affirmance is required by this Court's precedents,[1] it is necessary to begin with a more complete statement of the disputed factual issues

[1]This would, of course, be an easy case if the Court disavowed its dicta in Part II of the opinion in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-95 (1978). Like

that the jury resolved in respondent's favor, and then to comment on the procedural posture of the case. Finally, I shall discuss the special importance of the character of the wrongful conduct disclosed by this record.

I

[47] The city of St. Louis hired respondent as a licensed architect in 1968. During the ensuing decade, he was repeatedly promoted and consistently given "superior" performance ratings. In April 1980, while serving as the Director of Urban Design in the Community Development Agency, he was recommended for a two-step salary increase by his immediate superior.

[48] Thereafter, on two occasions he gave public testimony that was critical of official city policy. In 1980 he testified before the Civil Service Commission in support of his successful appeal from a 15-day suspension. In that testimony he explained that he had received advance oral approval of his outside employment and voiced his objections to the requirement of prior written approval. The record demonstrates that this testimony offended his immediate superiors at the CDA.

[49] In 1981 respondent testified before the Heritage and Urban Design Commission in connection with a proposal to acquire a controversial rusting steel sculpture by Richard Serra. In his testimony he revealed the previously undisclosed fact that an earlier city administration had rejected an offer to acquire the same sculpture, and also explained that the erection of the sculpture would require the removal of structures on which the city had recently expended about $250,000. This testimony offended top officials of the city government, possibly including the Mayor, who supported the acquisition of the Serra sculpture, as well as respondent's agency superiors. They made it perfectly clear that they believed that respondent had violated a duty of loyalty to the Mayor by expressing his personal opinion about the sculpture. . . . .

[50] After this testimony respondent was the recipient of a series of adverse personnel actions that culminated in his transfer from an important management-level professional position to a rather menial assignment for which he was "grossly over qualified," and his eventual layoff. In preparing respondent's service ratings after the Serra sculpture incident, his superiors followed

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many commentators who have confronted the question, I remain convinced that Congress intended the doctrine of *respondent superior* to apply in § 1983 litigation. Given the Court's reiteration of the contrary *ipse dixit* in *Monell* and subsequent opinions, however, I shall join the Court's attempt to draw an intelligible boundary between municipal agents' actions that bind and those that do not. Since it represents a departure from Congress' initial intention that *respondent superior* principles apply in this context, this endeavor necessarily involves the Court in some consideration of "new theory." Even so, we should be guided by the congressional purposes that motivated the enactment of § 1983 rather than by a nonstatutory judge-made presumption that gives "extremely wide latitude" to a profusion of "local preferences."

a "highly unusual" procedure that may have violated the city's personnel regulations. Moreover, management officials who were involved in implementing the decision to transfer respondent to a menial assignment made it clear that "there was no reason" for the transfer — except, it would seem, for the possible connection with "the Serra sculpture incident." It is equally clear that the city's asserted basis for respondent's ultimate layoff in 1983 — a lack of funds — was pretextual.

[51] Thus, evidence in the record amply supports the conclusion that respondent was first transferred and then laid off, not for fiscal and administrative reasons, but in retaliation for his public testimony before the CSC and HUD. It is undisputed that respondent's right to testify in support of his civil service appeal and his right to testify in opposition to the city's acquisition of the Serra sculpture were protected by the First Amendment to the Federal Constitution. Given the jury's verdict, the case is therefore one in which a municipal employee's federal constitutional rights were violated by officials of the city government. There is, however, a dispute over the identity of the persons who were responsible for that violation. At trial, respondent relied on alternative theories: Either his immediate superiors at CDA (who were named as individual defendants) should be held accountable, or, if the decisions were made at a higher level of government, the city should be held responsible.

[52] The record contains a good deal of evidence of participation in the constitutional tort by respondent's superiors at CDA, by those directly under the Mayor, and perhaps by the Mayor himself. Moreover, in closing argument, defense counsel attempted to exonerate the three individual defendants by referring to the actions of higher officials who were not named as defendants.

[53] Thus, we have a case in which, after a full trial, a jury reasonably concluded that top officials in a city's administration, possibly including the Mayor, acting under color of law, took retaliatory action against a gifted but freethinking municipal employee for exercising rights protected by the First Amendment to the Federal Constitution. The legal question is whether the city itself is liable for such conduct under § 1983.

* * *

III

[54] In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), we held that municipal corporations are "persons" within the meaning of 42 U.S.C. § 1983. Since a corporation is incapable of doing anything except through the agency of human beings, that holding necessarily gave rise to the question of what human activity undertaken by agents of the corporation may create municipal liability in § 1983 litigation.

[55] The first case dealing with this question was, of course, *Monell*, in which female employees of the Department of Social Services and the Board of Education of New York City

challenged the constitutionality of a citywide policy concerning pregnancy leave. Once it was decided that the city was a "person," it obviously followed that the city had to assume responsibility for that policy. Even if some departments had followed a lawful policy, I have no doubt that the city would nevertheless have been responsible for the decisions made by either of the two major departments that were directly involved in the litigation.

[56] In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court held that municipalities are not entitled to qualified immunity based on the good faith of their officials. As a premise to this decision, we agreed with the Court of Appeals that the city "was responsible for the deprivation of petitioner's constitutional rights." *Id.* at 633. Petitioner had been fired as City Chief of Police without a notice of reasons and without a hearing, after the City Council and the City Manager had publicly reprimanded him for his administration of the Police Department property room. This isolated personnel action was clearly not taken pursuant to a rule of general applicability; nonetheless, we had no problem with the Court of Appeals' conclusion that the action of the City Council and City Manager was binding on the city.

[57] In the next municipal liability case, the Court held that an isolated unconstitutional seizure by a sole police officer did not bind the municipality. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Thus, that holding rejected the common-law doctrine of *respondent superior* as the standard for measuring municipal liability under § 1983. It did not, of course, reject the possibility that liability might be predicated on the conduct of management level personnel with policymaking authority.

[58] Finally, in *Pembaur v. Cincinnati*, 475 U.S. at 471, we definitively held that a "decision by municipal policymakers on a single occasion" was sufficient to support an award of damages against the municipality. In *Pembaur*, a County Prosecutor had advised County Sheriffs at the doorstep of a recalcitrant doctor to "go in and get [the witnesses]" to alleged charges of fraud by the doctor. *Id.* at 473. Because the Sheriffs possessed only arrest warrants for the witnesses and not a search warrant for the doctor's office as well, the advice was unconstitutional, see *Steagald v. United States*, 451 U.S. 204 (1981), and the question was whether the County Prosecutor's isolated act could subject the county to damages under § 1983 in a suit by the doctor. In the part of his opinion that commanded a majority of the Court, JUSTICE BRENNAN wrote:

> [A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

Pembaur, 475 U.S. at 481. Since the County Prosecutor was authorized to establish law enforcement policy, his decision in that area could be attributed to the county for purposes of 1983 liability. As Justice Powell correctly pointed out in his dissent, "the Court . . . focus[ed] almost exclusively on the status of the decision-maker." *Id.* at 498.

[59] Thus, the Court has permitted a municipality to be held liable for the unconstitutional actions of its agents when those agents enforced a rule of general applicability (*Monell*); were of sufficiently high stature and acted through a formal process (*Owen*); or were authorized to establish policy in the particular area of city government in which the tort was committed (*Pembaur*). Under these precedents, the city of St. Louis should be held liable in this case.

[60] Both *Pembaur* and the plurality and concurring opinions today acknowledge that a high official who has ultimate control over a certain area of city government can bind the city through his unconstitutional actions even though those actions are not in the form of formal rules or regulations. Although the Court has explained its holdings by reference to the nonstatutory term "policy," it plainly has not embraced the standard understanding of that word as covering a rule of general applicability. Instead it has used that term to include isolated acts not intended to be binding over a class of situations. But when one remembers that the real question in cases such as this is not "what constitutes city policy?" but rather "when should a city be liable for the acts of its agents?", the inclusion of single acts by high officials makes sense, for those acts bind a municipality in a way that the misdeeds of low officials do not.

[61] Every act of a high official constitutes a kind of "statement" about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decisionmaking; they are not perceived as the actions of the city itself. If a county police officer had broken down Dr. Pembaur's door on the officer's own initiative, this would have been seen as the action of an overanxious officer, and would not have sent a message to other officers that similar actions would be countenanced. One reason for this is that the County Prosecutor himself could step forward and say "that was wrong"; when the County Prosecutor authorized the action himself, only a self-correction would accomplish the same task, and until such time his action would have countywide ramifications. Here, the Mayor, those working for him, and the agency heads are high-ranking officials; accordingly, we must assume that their actions have citywide ramifications, both through their similar response to a like class of situations, and through the response of subordinates who follow their lead.

[62] Just as the actions of high-ranking and low-ranking municipal employees differ in nature, so do constitutional torts differ. An illegal search (*Pembaur*) or seizure (*Tuttle*) is quite different from a firing without due process (*Owen*); the retaliatory personnel action involved in today's case is in still another category. One thing that the torts in *Pembaur*, *Tuttle*, and *Owen*

had in common is that they occurred "in the open"; in each of those cases, the ultimate judgment of unconstitutionality was based on whether undisputed events (the breaking-in in *Pembaur*, the shooting in *Tuttle*, the firing in *Owen*) comported with accepted constitutional norms. But the typical retaliatory personnel action claim pits one story against another; although everyone admits that the transfer and discharge of respondent occurred, there is sharp, and ultimately central, dispute over the reasons — the motivation — behind the actions. *The very nature of the tort is to avoid a formal process. Owen*'s relevance should thus be clear. For if the Court is willing to recognize the existence of municipal policy in a nonrule case as long as high enough officials engaged in a formal enough process, it should not deny the existence of such a policy merely because those same officials act "underground," as it were. It would be a truly remarkable doctrine for this Court to recognize municipal liability in an employee discharge case when high officials are foolish enough to act through a "formal process," but not when similarly high officials attempt to avoid liability by acting on the pretext of budgetary concerns, which is what this jury found based on the evidence presented at trial.

* * *

[63] I would affirm the judgment of the Court of Appeals.

Notes on Praprotnik

1. As you can see, *Praprotnik* is a plurality opinion, joined by only four members of the Court. A majority of the Court subsequently adopted the principles of *Praprotnik* in *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989).

2. Municipalities are considered "persons" for purpose of § 1983, and are therefore amenable to suit under that statute. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). States (and their instrumentalities) are not considered persons for purposes of § 1983, and therefore may not be sued thereunder. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

3. Unlike public servants sued under § 1983, a municipality sued under that statute enjoys *no immunity whatsoever*. See *Owen v. City of Independence*, 445 U.S. 622 (1980). But, as Justice O'Connor emphasizes in *Praprotnik*, municipalities may not be held liable under § 1983 simply because they employ an individual who violates federal law. Thus, they have no liability on the strict basis of *respondeat superior*.

4. Although a municipality may not be held liable under § 1983 on a theory of *respondat superior*, it can be held liable if it adopts a policy of "deliberate indifference to the rights of persons with whom [public servants] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Plaintiffs seeking to establish municipal liability for failure to train or supervise must meet this standard.