INTRODUCTION

This Supplement is designed to accompany the Second Edition of the Casebook. Any instructors still using the First Edition should use the 2018 Supplement. However, transition to the Second Edition of the Casebook is strongly recommended, as at this point the First Edition is two years out of date.

With this Second Edition, the Constitution and relevant statutory material have been moved from the Casebook to the Supplement. They appear after the new case materials.

Highlights of the new case materials include:

• *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which holds that political gerrymandering claims present nonjusticiable political questions.

• *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), which includes a discussion of standing issues regarding causation and redressability.

• *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019), which overrules *Nevada v. Hall*’s holding that a state can be sued in a court of a different state.

• *Allen v. Cooper*, 140 S. Ct. 994 (2020), which invalidates Congress’s attempt to abrogate state sovereign immunity from suit for copyright violations and clarifies that *Central Va. Comm. College v. Katz*, a prior case about state immunity in bankruptcy proceedings, is limited to the bankruptcy context.

• *June Medical Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020), which reaffirms the standing of abortion providers to challenge abortion restrictions as violative of the rights of their patients.

I thank Victoria Barnard for research assistance.

J.S.
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Part I: NEW CASES AND MATERIALS

Updates to Chapter 2

C. Standing to Sue

2. The Requirements of Standing Doctrine—Injury

Add a new note 6 on p. 74:

6. *American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067 (2019), concerned an Establishment Clause challenge to a roadside cross on public property in Maryland. In a fractured set of opinions, the Supreme Court held that the placement of the cross did not violate the Establishment Clause. In a partial concurrence, Justice Gorsuch, joined by Justice Thomas, argued that the plaintiff lacked standing to sue. The plaintiff alleged that its members regularly viewed the cross while driving past it. Justice Gorsuch argued that a party whose only injury is that of being an “offended observer” of a religious display lacks standing. Justice Gorsuch argued that such parties have no more standing to sue than a bystander offended by allegedly unlawful police behavior directed at someone else. Allowing standing to “offended observers,” Justice Gorsuch claimed, would undermine “generalized grievance” cases such as *Schlesinger*, as plaintiffs could gain standing by claiming offense at the challenged government policy.

Justice Ginsburg, dissenting, pointed out that the Court had heard numerous Establishment Clause challenges to religious displays without doubting that plaintiffs who observed the displays had standing to sue. Does the nature of an Establishment Clause violation make standing appropriate for an “offended observer” of a religious display?

Most of the Justices, including those who made up the Court majority, made no mention of the issue of standing. Was this appropriate? Standing is a jurisdictional issue that the Court must raise sua sponte if necessary, e.g., *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001), so where two Justices expressly argue that the case should be dismissed for lack of standing, is the majority not obliged at least to state expressly that it disagrees?

3. The Requirements of Standing Doctrine—Causation and Redressability

Add at the end of note 4 on p. 84:

See also *Barr v. American Ass’n of Political Consultants*, 140 S. Ct. 2335 (2020) (confirming the continuing validity of *Heckler v. Mathews*).

Add a new note 5 on p. 84:

5. Does Evidence Matter? In *Simon* and the other cases discussed above, the Court condemned the plaintiffs’ allegations of causation as “speculative.” What if a plaintiff in a comparable situation offers evidence to support a causal allegation? In *Department of
Commerce v. New York, 139 S. Ct. 2551 (2019), plaintiffs, including the state of New York, challenged the decision of the Secretary of Commerce to include a question about citizenship in the 2020 federal census. Plaintiffs claimed that including this question would cause many noncitizens to fail to fill out their census forms (because of fear of, for example, adverse immigration law consequences), which would have the effect of undercounting noncitizens. This undercount would cause states with a relatively large number of resident noncitizens to suffer reduced representation in the U.S. House of Representatives and reduced federal funding. (All U.S. residents, including noncitizens, count for census purposes, and therefore for the purposes of apportioning the House of Representatives and allocating federal funding under numerous federal statutes.)

The Secretary argued that the plaintiffs lacked standing to sue. Any injury that the plaintiffs might suffer, the Secretary argued, would not be fairly attributable to the Secretary’s decision to include a citizenship question on the census form, but to the actions of numerous, independent third parties who might refuse to fill out the census form. The Secretary argued that the Court should not accept the plaintiffs’ “speculation” about the actions of independent third parties, particularly given that (1) filling out the census forms is required by law and (2) the government is legally prohibited from using census data for noncensus purposes such as immigration enforcement. The district court, however, concluded that the plaintiffs had provided evidence, including studies by the Census Bureau itself, showing that the inclusion of a citizenship question on the census form would likely lead to undercounting of noncitizens that would result in injury to the plaintiffs. The Supreme Court affirmed this factual finding as not clearly erroneous. The plaintiffs’ standing, the Court held, did “not rest on mere speculation about the decisions of third parties, . . . [but] on the predictable effect of Government action on the decisions of third parties.”

Was the effect of the government’s challenged action on the behavior of third parties any more “predictable” in this case than in Simon or Linda R.S.? If the plaintiffs in those cases had proffered studies suggesting that fathers subject to prosecution for failure to make child support payments are more likely to make them, or that the prospect of losing a tax exemption would make a hospital more likely to provide free care to indigent patients, would those cases have come out differently? Does it make a difference that the census case involved the predictable effect of government action on the decisions of numerous third parties?

4. Further Aspects of the Injury Requirement

c. Injuries of Official Plaintiffs

Add to note 3, p. 115:

On the other hand, in Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019), the Supreme Court held that the Virginia House of Delegates (one house of the Virginia state legislature) lacked standing to appeal a federal district court order striking down the state statute that created the state’s legislative districts. The case began when some Virginia voters sued state officials on the claim that the statutory districts were unconstitutionally racially gerrymandered. The Virginia House of Delegates intervened as a defendant. After the plaintiffs prevailed, the (newly elected) Virginia Attorney General declined to take an appeal. The House of Delegates attempted to appeal, but the Supreme Court held that it lacked standing. The House
could not appeal on behalf of the state, the Court held, because state law assigned the representation of the state to its Attorney General. Nor could the House appeal on its own behalf, because, the Court held, a court’s striking down a state law as unconstitutional does not work an injury on one house of the legislature that passed the law. The Court distinguished Arizona State Legislature on the ground that the plaintiff in that case was the whole state legislature, not just one of its houses, and “a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.” The Court also rejected the House’s argument that it was injured because the court-ordered change to its districts would change its membership. Noting that the membership of the House was determined by the voting public, not by the House, the Court held that changes to the membership brought about by the voting public would work no cognizable injury to the House. Four Justices dissented.

6. Third-Party Standing

Add as note 2(e) on p. 147:

In June Medical Servs. LLC v. Russo, 140 S. Ct. 2103 (2020), the Supreme Court reaffirmed the standing of doctors to challenge abortion restrictions (in particular, a requirement that a doctor performing an abortion have admitting privileges at a nearby hospital) on the ground that they violate the constitutional rights of their patients. It said, moreover, that “we have generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” The Court did not explicitly rely on the “relationship” between abortion providers and those seeking abortion, but it observed that the threat of penalties faced by the providers “eliminates any risk that their claims are abstract or hypothetical” and “assures us that [they] have every incentive to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.”

The Court also reiterated that the prohibition on the raising of third-party rights is only prudential, not constitutionally required, and that it can therefore be waived, as the Court held it had been by the defendant’s “unmistakable concession” of the issue in the lower courts.

Justice Thomas wrote a lone dissent in which he argued for a complete rethinking of third-party standing doctrine. The doctrine, he suggested, should be regarded as constitutionally based, not “prudential,” and should return to its 19th-century formulation, under which a plaintiff could not establish a case or controversy by asserting the constitutional rights of others.

Justice Alito, in a dissenting opinion joined (in this part) by two other Justices, accepted the current formulation of third-party standing doctrine, but said that it should not allow the plaintiff abortion providers to assert the interests of women who wish to obtain abortions. The interests of the two groups were, he argued, in conflict, inasmuch as the law in question regulated abortion providers in order to protect the health of women seeking abortions. The majority

* The decision was via a plurality opinion written by Justice Breyer for himself and three other Justices, but the Chief Justice, who concurred in the result, said that he agreed with the plurality’s opinion on the standing issue “[f]or the reasons the plurality explains.”
observed that the same configuration (a plaintiff challenging a law as violative of the rights of customers, when the law might have been designed to protect those customers from that plaintiff) was common in third-party standing cases, e.g., Craig v. Boren, Casebook p. 142.

D. Mootness

Add a new note on p. 167:

2. If a plaintiff challenges the constitutionality of a statute or ordinance and the challenged provision is repealed while the litigation is pending, is the litigation moot? The Supreme Court has generally said yes. E.g., New York State Rifle & Pistol Ass’n, Inc. v. City of New York, 140 S. Ct. 1525 (2020); Kremens v. Bartley, 431 U.S. 119 (1977). Why would such a case not fall within the “voluntary cessation” exception?

Add a new note on p. 161:

6. Defunis involved a claim for injunctive relief. An unpaid claim for damages never becomes moot. As the Supreme Court observed in Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019), “nothing so shows a continuing stake in a dispute’s outcome as a demand for dollars and cents.” Claims for damages ensure a live controversy if they are “at all plausible,” even if recovery on the claim is “uncertain or even unlikely,” and even if recovery may have little practical value because, for example, the defendant is insolvent. Id. at 1660-61. A claim for damages may, of course, fail—it may get dismissed, lose on summary judgment, or simply not succeed at trial—but in such cases “[d]amages should be denied on the merits, not on grounds of mootness.” CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 622 (3d Cir. 2013). *

F. The Political Question Doctrine

Insert on p. 214, before Morgan:

RUCHO v. COMMON CAUSE
139 S. Ct. 2484 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

... [In two separate cases, consolidated for Supreme Court purposes, plaintiffs challenged the congressional district maps in North Carolina and Maryland as unconstitutional partisan gerrymanders. The North Carolina map was favorable to Republicans; the Maryland map, to Democrats. The maps favored one political party by “packing” most supporters of the other into

* There is conflicting authority as to whether a claim for nominal damages will save an otherwise moot case. Compare Flanigan’s Enterprises, Inc. v. City of Sandy Springs, 868 F.3d 1248 (11th Cir. 2017) (no) with Morgan v. Plano Independent School Dist., 589 F.3d 740, 748 (5th Cir. 2009) (yes). Also, while a defendant cannot moot a damages class action by offering to pay the named plaintiff’s claim in full, Campbell-Ewald v. Gomez, 136 S. Ct. 663 (2016), the Court has reserved the question of what happens if the defendant actually pays. Id. at 672.
a small number of districts and/or “cracking” supporters of the other into small groups spread over multiple districts, with the result that the favored party would likely win a substantially higher percentage of the state’s congressional seats than its percentage of the statewide congressional vote. In each case, a three-judge district court held that the map violated the Equal Protection Clause and/or the First Amendment, and the defendants appealed directly to the Supreme Court pursuant to 28 U.S.C. §1253.]

II

A

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” We have understood that limitation to mean that federal courts can address only questions “historically viewed as capable of resolution through the judicial process.” Flast v. Cohen, 392 U. S. 83, 95 (1968). . . .

Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 1 Cranch 137, 177 (1803). Sometimes, however, “the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” Vieth v. Jubelirer, 541 U. S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a “political question” and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. Baker v. Carr, 369 U. S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].” Ibid.

. . . The question here is whether there is an “appropriate role for the Federal Judiciary” in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere. . . .

B

. . . [The court reviewed the constitutional provisions governing elections and the history of its one-person, one-vote cases and its racial and partisan gerrymandering cases. The Court observed that the Elections Clause of the Constitution, Art. I, § 4, cl. 1, allows state legislatures to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. The Court noted that it had previously resolved challenges to districts of unequal size and challenges to racial gerrymanders.]

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.” . . . To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerrymandering has gone too far.” . . .
Any standard for resolving [partisan gerrymander] claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” . . . “[T]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.” . . . An expansive standard requiring “the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process.” . . . 

. . . [T]he question is one of degree: How to “provide[e] a standard for deciding how much partisan dominance is too much.” . . . [I]t is vital . . . that the Court act only in accord with especially clear standards: “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” . . . If federal courts are to “inject [themselves] into the most heated partisan issues” by adjudicating partisan gerrymandering claims, . . . they must be armed with a standard that can reliably differentiate unconstitutional from “constitutional political gerrymandering.” . . .

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. . . . [T]hey invariably sound in a desire for proportional representation. . . . “Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” . . .

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or “general ticket” elections. Such States typically sent single-party delegations to Congress. . . . That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. . . .

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. . . .

The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of “unfairness” in any winner-take-all system. Fairness may mean a greater number of competitive districts. . . . But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. . . . “[I]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.” . . .

On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. . . . Such an approach, however, comes at the expense of competitive
districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. . . . But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. . . .

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts. . . .

And it is only after determining how to define fairness that you can even begin to answer the determinative question: “How much is too much?” At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court “reverse gerrymander” other parts of a State to counteract “natural” gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are “unguided and ill suited to the development of judicial standards,” . . . and “results from one gerrymandering case to the next would likely be disparate and inconsistent.” . . .

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. . . . “[T]his Court is not responsible for vindicating generalized partisan preferences.
The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” . . .

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. “[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country’s long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion.” . . . Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of “tests” for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

. . . [The North Carolina District Court, in holding that districts in North Carolina’s 2016 plan violated the Equal Protection Clause, applied a test that required plaintiffs to show that (1) the “predominant purpose” of a district was to entrench one political party in power and (2) the favored party’s entrenchment was likely to continue in subsequent elections such that an elected representative from that party would not feel a need to be responsive to constituents who support the disfavored party. Defendants were then given an opportunity to show that the discriminatory effects were “attributable to a legitimate state interest or other neutral explanation.”]

The District Court’s “predominant intent” prong is borrowed from the racial gerrymandering context. . . . If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because “race-based decisionmaking is inherently suspect.” . . . But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent “predominates.”

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution “is likely to persist” to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. . . . But “[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites ‘findings’ on matters as to which neither judges nor anyone else can have any confidence.” . . . [This proposed test] requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). . . . Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two
leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. . . . Asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. . . .

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. . . . Both District Courts concluded that the districting plans at issue violated the plaintiffs’ First Amendment right to association . . . [by, for example, creating “a lack of enthusiasm” among supporters of the disfavored party.]

[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

. . . [I]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? . . .

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no “clear” and “manageable” way of distinguishing permissible from impermissible partisan motivation. . . . The decisions below . . . would render unlawful all consideration of political affiliation in districting, . . . contrary to our established precedent.

C

The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. . . .

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent’s proposed constitutional test is indeterminate and arbitrary.
Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” . . . Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, . . . but it seems a useful way to make the point.) The dissent’s answer says it all: “This much is too much.” . . . That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. . . . True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine “substantial anticompetitive effect[s]” in antitrust law. . . . That language, however, grew out of the Sherman Act, understood from the beginning to have its “origin in the common law” and to be “familiar in the law of this country prior to and at the time of the adoption of the [A]ct.” . . . Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, §4, cl. 1. . . .

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles,” . . . does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. “[J]udicial action must be governed by standard, by rule,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws. . . . Judicial review of partisan gerrymandering does not meet those basic requirements.

. . . What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. . . .

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. . . . [The Court cited various state laws that limit or prohibit partisan gerrymandering.]

As noted, the Framers gave Congress the power to do something about partisan
gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. . . . Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. . . .

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say “this is not law.”

The judgments of the [district courts] are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

J USTICE KAGAN, with whom J USTICE GINSBURG, J USTICE BREYER, and J USTICE SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

. . . The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. . . . These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. . . . If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is not beyond the courts. The majority’s abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority’s own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. . . . In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. . . . [I]t is necessary . . . [t]o recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. . . . [Justice Kagan explained how North Carolina officials deliberately drew a Republican-favoring congressional district map that allowed Republican candidates to win 75% or more of the state’s congressional seats with 53% or less of the statewide congressional vote, and Maryland officials deliberately drew a Democrat-favoring map that allowed Democratic candidates to win 87.5% of the state’s congressional seats with 65% or less of the statewide congressional vote.]

B

. . . Is that how American democracy is supposed to work? I have yet to meet the person who
thinks so.


Free and fair and periodic elections are the key to that vision. . . . Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. . . . By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. . . . The “core principle of republican government,” this Court has recognized, is “that the voters should choose their representatives, not the other way around.” . . .

The majority disputes none of this. . . . Indeed, the majority concedes (really, how could it not?) that gerrymandering is “incompatible with democratic principles.” . . .

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren’t bad enough). It violates individuals’ constitutional rights as well. . . . [Justice Kagan argued that under the Supreme Court’s cases, drawing district lines in a way that makes the votes of supporters of one political party count for less violates the Equal Protection Clause and the First Amendment.]

Once again, the majority never disagrees; it appears to accept the “principle that each person must have an equal say in the election of representatives.” . . . And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights . . . the majority declines to provide any remedy. For the first time in this Nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. . . . And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: ‘How much is too much?’ ” . . .

[The majority] identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But . . . [w]hat [the majority] says can’t be done has been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have
largely converged on a standard for adjudicating partisan gerrymandering claims. . . . And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. . . .

A

Start with the standard the lower courts used. . . . Both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials’ “predominant purpose” in drawing a district’s lines was to “entrench [their party] in power” by diluting the votes of citizens favoring its rival. . . . Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votes. . . . And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. . . . If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test’s application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. . . .

The majority does not contest the lower courts’ findings. . . . Instead, the majority says that state officials’ intent to entrench their party in power is perfectly “permissible,” even when it is the predominant factor in drawing district lines. . . . But that is wrong. True enough, that the intent to inject “political considerations” into districting may not raise any constitutional concerns. . . . And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. . . . But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. . . .

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. . . . The evidence reveals just how bad the two gerrymanders were. . . . [Justice Kagan reviewed the evidence in the North Carolina case, in which the plaintiffs’ experts randomly generated thousands of district maps using all of the state’s own declared districting criteria except partisan gain. More than 99% of the maps thus generated would have yielded at least one more seat likely to be won by a Democratic candidate, and over 70% would have yielded at least two more. In the Maryland case, only a single allegedly gerrymandered district was involved. In the district’s old boundaries, 47% of registered voters were Republicans and 36% Democrats; in the new boundaries, 44% of registered voters were Democrats and 33% Republicans. Following this redistricting, Democrats won the once-reliably Republican seat four consecutive times.]

The majority claims all these findings are mere “prognostications” . . . in which no one “can have any confidence.” . . . But the . . . [findings] were evidence-based . . . [The district courts] did not bet America’s future—as today the majority does—on the idea that maps constructed . . . to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence . . . and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in
entrenching themselves in office. . .

B

The majority’s broadest claim, as I’ve noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be “politically neutral” or “manageable.” . . . Courts, the majority argues, will have to choose among contested notions of electoral fairness. . . . And even once courts have chosen, the majority continues, they will have to decide “[h]ow much is too much?”—that is, how much deviation from the chosen “touchstone” to allow? . . . So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. . . .) But it never tries to analyze . . . whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you’ve already heard enough to know, is the latter. That kind of oversight is not only possible; it’s been done.

Consider neutrality first. Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State’s actual map to an “ideally fair” one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. . . . [T]he State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians’ effort to entrench themselves in office.

. . . [Justice Kagan argued that in the North Carolina case, the thousands of randomly generated maps, which incorporated the state’s own districting criteria other than partisanship, provided a neutral baseline from which to judge whether the state’s actual map reflected “partisanship . . . run amok.”] Similarly, she said, Maryland’s Sixth District contradicted Maryland’s own districting criteria and could not have resulted from following the state’s own criteria without partisan considerations. In both cases, she argued, reliance on the state’s own criteria provides a neutral baseline independent of judicial preferences or a preference for proportional representation.]

The majority’s sole response misses the point. According to the majority, “it does not make sense to use” a State’s own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria “will vary from State to State and year to year.” . . . But that is a virtue, not a vice . . . . Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State’s districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. . . . But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (e.g., must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority’s analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. . . . But those two demands are different, and only the former is at issue here.
The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects “too much” partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. . . . And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. . . . Even the majority acknowledges that “[t]hese cases involve blatant examples of partisanship driving districting decisions.” . . . If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, . . . it could have used the lower courts’ general standard—focusing on “predominant” purpose and “substantial” effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. . . . That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, e.g., Miller v. Johnson, 515 U. S. 900, 916 (1995); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 533 (1993); Washington v. Davis, 426 U. S. 229, 239 (1976). Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map “substantially” dilutes the votes of a rival party’s supporters from the everything-but-partisanship baseline described above. . . . As this Court recently noted, “the law is full of instances” where a judge’s decision rests on “estimating rightly . . . some matter of degree”—including the “substantial[ity]” of risk or harm. . . . The majority is wrong to think that these laws typically (let alone uniformly) further “confine[ ] and guide[ ]” judicial decisionmaking. . . . They do not, either in themselves or through “statutory context.” . . . To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority’s suggestion, see . . . courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket. . . .

Everything in today’s opinion assumes that these cases grew out of a “desire for proportional representation” or, more generally phrased, a “fair share of political power.” . . . But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice’s removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals’ supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people’s power to vote.

III

. . .[O]ur oath and our office require us to vindicate all constitutional rights. But the need for
judicial review is at its most urgent in cases like these. “For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” . . .

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. “Dozens of [those] bills have been introduced,” the majority says. . . . [But] what all these bills have in common is that they are not laws. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight. . . .

Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Notes and Questions

1. Which of the following is the holding of the Court:

   a. The Constitution does not prohibit partisan gerrymandering. A state may engage in any degree of partisan gerrymandering without violating the Constitution.

   b. The Constitution prohibits, or at least limits, partisan gerrymandering, but when a state violates this constitutional constraint, a court cannot provide any remedy.

Justice Kagan says that the majority does not even dispute that extreme partisan gerrymandering undermines democracy and violates individual constitutional rights. Is she right about that?

2. Justice Kagan asserts, without contradiction by the Court, that Rucho is the first case in which the Supreme Court held a matter nonjusticiabl e because of a lack of “judicially discoverable and manageable standards” for resolving the plaintiff’s claim. One of the Rucho district courts explained that in prior cases, such a lack was considered as a factor supporting the determination that a matter was constitutionally committed to another branch of government, but it had never been held to make a matter nonjusticiabl e by itself. See Common Cause v. Rucho, 318 F. Supp. 3d 777, 842 n.19 (M.D.N.C. 2018), rev’d, 139 S. Ct. 2484 (2019). Is it ever appropriate for a court to decline to enforce the Constitution solely because it believes it cannot discover a judicially manageable standard by which to judge the plaintiff’s claim?

   Assume that the Constitution permits a state to draw its congressional districts in a way that provides some advantage to one political party over another, but also places some limit on the degree of partisan advantage that the district map may confer. Is the Court correct that there is no principled way for a court to determine whether a state has violated the constitutional limitation? Is the difficulty of articulating and applying this constitutional limitation different in kind from the difficulties involved in articulating and applying the limitations involved in other cases under the First Amendment or the Equal Protection Clause, or in determining, for example, what constitutes an “excessive” fine for Eighth Amendment purposes? Given that “courts routinely fashion doctrinal tests to implement vague constitutional language,” what explains the

4. If there is a constitutional constraint on partisan gerrymandering but the constraint is not judicially enforceable, how else might it be enforced? Is Justice Kagan correct that it is especially important for courts not to withhold judicial remedies for violations of constitutional constraints on the political process? Why would providing judicial remedies for these constitutional violations be more important than providing judicial remedies for any other kind of constitutional violations?

5. What *should* be done about partisan gerrymandering? Bear in mind that, depending on the political geography of a state, it might be possible to draw normal-seeming, compact districts that heavily favor one party. For example, if a state’s overall population were 60% Democrats and 40% Republicans, but the Republican minority were uniformly distributed across all regions of the state, it would be easy for the state legislature, if dominated by Democrats, to divide the state into any number of districts that were 60% Democratic and 40% Republican, all of which would probably be safe Democratic seats. With such a map, Republicans would likely get 40% of the overall statewide vote but 0% of the legislative seats. Would that be a constitutional problem, and if so, could there be any judicial remedy?

Or suppose a state entitled to five congressional seats happened to look like figure A below (R = Republican-dominated county, D = Democrat-dominated county, all counties of the same size and population). Such a state could be divided into five districts as shown in figures B or C, but figure B would produce three reliably Republican seats and two reliably Democratic seats, whereas figure C would produce five reliably Republican seats. If the state’s legislature, dominated by Republicans, chose the map in figure C, would that violate the Constitution? Could there be any judicial remedy? How would Justice Kagan handle such cases?

R D R D R
R D R D R
R D R D R
R D R D R
R D R D R
R D R D R

Figure A

R D R D R
R D R D R
R D R D R
R D R D R
R D R D R
R D R D R

Figure B

R D R D R
R D R D R
R D R D R
R D R D R
R D R D R
R D R D R

Figure C

On the other hand, real-life gerrymandering often leads to maps so outrageous and unnatural in appearance that there can be no doubt that they were drawn for partisan advantage. The majority in *Rucho* acknowledged that the two cases before the Court involved “blatant examples of partisanship driving districting decisions.” Is the majority right to say that there can be no remedy for this kind of gerrymandering? Is there really no middle ground between denying all judicial remedy for political gerrymandering and having courts take over the districting process based on judicial notions of fairness that are inherently grounded in a theory of proportional representation?
Updates to Chapter 3

Add as a footnote on p. 234, at the end of the last sentence before heading b:

In *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), the Supreme Court declined to extend *Boumediene* and held that the Suspension Clause does not prevent Congress from limiting the availability of habeas for aliens seeking review of their claims for asylum. Proceeding on the assumption (accepted by the parties) that the Suspension Clause protects the habeas writ as it existed in 1789, the Court held that the clause protects only the right to use habeas to request release from custody. The Suspension Clause does not guarantee a right to use habeas to claim a right to remain in the United States. Five Justices agreed fully in the opinion, two concurred in the result and two dissented.

Updates to Chapter 4

Add a new note on p. 427:

5. This section features cases in which the Supreme Court approved application of federal common law, but students should bear in mind that such cases are unusual. In *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020), the Court emphasized that “federal common law plays a necessarily modest role” in a legal system in which legislative power is reserved to Congress and the states. The Court reiterated that “only limited areas exist in which federal judges may appropriately craft the rule of decision,” and that “before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied.” The Court disapproved creating a federal common law rule to determine how to distribute a tax refund among a group of related corporations that file a single tax return. IRS regulations required the IRS to pay the refund to the agent designated by the corporations, but said nothing about how the refund should thereafter be distributed if there is disagreement among the corporations as to which of them is entitled to it. Some federal courts had developed a federal common law rule to address that issue. The Supreme Court, however, reiterated that federal courts can make common law only when “necessary to protect uniquely federal interests.” It held that the federal government has an interest in regulating how it *receives* taxes from a group of related corporations, and in how it *delivers* their refund to them, but no interest in how the refund is then *distributed* among the corporations involved—even if, as in the actual case, one of the corporations was in the midst of a federal bankruptcy proceeding and another had been taken over by the Federal Deposit Insurance Corporation. Accordingly, the Court held, state law would resolve the conflicting claims to the tax refund.
Updates to Chapter 7

Replace note 2 on p. 692 with:

2. Does *Katz* indicate that henceforth Congress’s ability to abrogate state sovereign immunity using its Article I powers should be determined on a “clause-by-clause” basis, that is, independently for each Article I power? In *Allen v. Cooper*, 140 S. Ct. 994 (2020), the Supreme Court said no. The Court said that “everything in Katz is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism.” The Court called *Katz* a “good-for-one-clause-only holding.”

*Allen* therefore reverted to the usual, pre-*Katz* analysis and invalidated the federal Copyright Remedy Clarification Act (CRCA), which purported to abrogate state sovereign immunity from suits for copyright violations. The Court held that the statute, like the patent remedy statute at issue in *Florida Prepaid*, was based on a sparse record of states violating intellectual property rights at all, and certainly on an insufficient record of states violating intellectual property rights in a way that might implicate the 14th Amendment’s Due Process Clause. Accordingly, the Court held, the CRCA failed the “congruence and proportionality” test. The Court hinted, though, that Congress might still validly abrogate state sovereign immunity from suits for copyright violations if it compiled a better legislative record. The Court noted that Congress had passed the CRCA before *Seminole Tribe* and so it would not at the time have understood its responsibility to compile the needed legislative record before passing the statute.

Add a new note 4 on p. 702:

4. *Alden* concerns a state’s immunity from suit in its own courts. Can a state be sued in a court of another state? The Supreme Court said yes in *Nevada v. Hall*, 440 U.S. 410 (1979), but recently changed its mind. In *Hall*, an employee of the state of Nevada caused a car accident in California. The injured plaintiffs sued Nevada in California state court and won a money judgment. Affirming this judgment, the U.S. Supreme Court analogized the case to cases involving foreign sovereign immunity. When the Constitution was adopted, nations were immune from suit in the courts of other nations, but this immunity was regarded as existing only by the grace of the nation in which the suit took place. Similarly, the Court held, states may grant other states immunity from suit in their courts, but are not obliged to do so.

The Supreme Court overruled *Nevada v. Hall* in *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019), which involved a suit brought in Nevada against the California state tax authority for tortious conduct occurring in Nevada. Drawing on the usual quotations from Hamilton, Madison, and Marshall, the Court said that the founding generation “took as given that States could not be haled involuntarily before each other’s courts.” The Court rejected *Nevada v. Hall*’s analogy to foreign sovereign immunity on the ground that under the Constitution, the relationships between states are not akin to those between independent sovereign nations. The Court held that the Constitution “implicitly strips States of any power they once had to refuse each other sovereign immunity.”

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Updates to Chapter 8

Add as note 5 on p. 731:

The Supreme Court applied Ziglar in Hernandez v. Mesa, 140 S. Ct. 735 (2020), which arose when a U.S. Border Patrol agent shot and killed the plaintiffs’ son near the U.S.-Mexico border. The agent fired from the U.S. side of the border, but the bullet killed the plaintiffs’ son, a Mexican national, on the Mexican side. The plaintiffs sued the agent under Bivens for violation of their son’s Fourth and Fifth Amendment rights. Even though prior cases had recognized Bivens claims under the Fourth and Fifth Amendments, the Court held it “glaringly obvious” that the case involved a “new context” because of its cross-border element. The Court found “special factors cautioning hesitation” in the case’s potential effect on foreign relations and national security. Accordingly, the Court determined that Congress, not the courts, should decide whether to provide a remedy in this kind of case.

Justices Thomas and Gorsuch joined the majority opinion but suggested in a separate concurrence that the Court should discard the Bivens doctrine altogether. Justices Ginsburg, Breyer, Sotomayor, and Kagan, dissenting, argued that the case fell under the familiar rule that using lethal force against a person who presents no threat effects an unconstitutional seizure. E.g., Tennessee v. Garner, 471 U.S. 1 (1985).

Updates to Chapter 9

Add as note 6 on p. 848:

In Trump v. Vance, 140 S. Ct. 2412 (2020), Cyrus Vance, a New York state prosecutor, served a grand jury subpoena on President Trump’s private accounting firm in state court, requiring the firm to produce the President’s tax returns and other information. The President sued Vance in federal court and sought an injunction against enforcement of the subpoena. The district court dismissed on the basis of Younger abstention. The court of appeals reversed with regard to Younger, saying that Younger’s goal of avoiding federal-state conflict could not be achieved in a case that necessarily posed a conflict between state and federal officials. On the merits, however, the court of appeals held that the President was not entitled to injunctive relief.

The Supreme Court granted the President’s petition for certiorari. Vance defended the court of appeals’ ruling on the merits and did not challenge its ruling on the Younger issue. The Supreme Court affirmed on the merits. It mentioned the Younger issue but did not expressly rule on it. What does this suggest about Younger abstention?

The Supreme Court did note that if a state prosecutor used grand jury subpoenas to harass the President, a federal court could enjoin them under the “harassment” exception to Younger. The Court also said that it would be unconstitutional for a state to use subpoenas to retaliate against the President for official acts and that “federal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.” Does this statement implicitly hold that Younger abstention would never bar such a suit by the President?
Updates to Chapter 10

Add new note 4a on p. 940:

4a. A state appellate court decision that provides for further proceedings in lower state courts may also be “final” for purposes of §1257 if under state law the appellate case is technically an original proceeding, such as a petition for a writ of mandamus, as opposed to an appeal. What justifies this rule? Is such a judgment really “final” simply because the state appellate proceeding is technically a separate case? The Supreme Court has sometimes suggested that more than this technical distinction is required. However, in *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020), the defendant in a state-court action sought an extraordinary writ from the state supreme court on the ground that federal law pre-empted the plaintiffs’ cause of action. After the state supreme court issued a decision that permitted the trial to proceed, the U.S. Supreme Court granted certiorari and held that the state decision was a “final judgment” under § 1257 simply because the writ proceeding was “a self-contained case, not an interlocutory appeal.” Do the technicalities of state practice really justify this result?

Updates to Chapter 11

B. Habeas Corpus for Persons Held Pursuant to a Criminal Conviction

3. Claims Cognizable in Habeas Corpus Proceedings

Add at end of note 3, p. 1022: *See also Shoop v. Hill*, 139 S. Ct. 504 (2019) (reiterating that a federal court considering a habeas petition may not rely on a Supreme Court case decided after the prisoner’s conviction became final, even if the federal court regards the case as “merely an application” of a case decided before the prisoner’s conviction became final).

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*See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (justifying review of a personal jurisdiction decision on the ground that otherwise the defendant would either have to default or enter a general appearance and defend on the merits), *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 385, n.7 (1976) (suggesting that the state appellate decision is final if it considered only the jurisdiction of a lower state court).
A. The Constitution

Constitution
of the United States of America

Preamble

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 chuse 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 chuse 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 Places 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 Behaviour, 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 Offences
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 Controul 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 chuse 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 chuse the President. But in chusing 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 chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing 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 encreased 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 Offences 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 faith fully 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 Behaviour,
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; — 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 State 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 In witness whereof We have hereunto subscribed our Names

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.

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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 defense.

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 reexamined 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. This 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 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Section 2. The Congress shall have the 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.
B. Selected Federal Statutes

1. Selected Provisions of Title 28, United States Code

PART I—ORGANIZATION OF COURTS

CHAPTER 1—SUPREME COURT

§1. Number of justices; quorum

The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

CHAPTER 3—COURTS OF APPEALS

§43. Creation and composition of courts

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.
(b) Each court of appeals shall consist of the circuit judges of the circuit in regular active service.

§44. Appointment, tenure, residence and salary of circuit judges

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits [in specified numbers for each circuit].
(b) Circuit judges shall hold office during good behavior.

§46. Assignment of judges; panels; hearings; quorum

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges unless a hearing or rehearing in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

CHAPTER 5—DISTRICT COURTS

§132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.
(b) Each district court shall consist of the district judge or judges for the district in regular active service.
(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court may be exercised by a single judge.
§133. Appointment and number of district judges

(a) The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts [in specified numbers for each district].

§134. Tenure and residence of district judges

(a) The district judges shall hold office during good behavior.

CHAPTER 6—BANKRUPTCY JUDGES

§151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding.

§152. Appointment of bankruptcy judges

Each bankruptcy judge to be appointed for a judicial district shall be appointed by the court of appeals of the United States for the circuit in which such district is located. Each bankruptcy judge shall be appointed for a term of fourteen years.

§157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—
   (A) matters concerning the administration of the estate;
   (B) allowance or disallowance of claims against the estate . . . ;
   (C) counterclaims by the estate against persons filing claims against the estate;
   [(D) – (P) specify other core proceedings] . . . .

(c) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

§158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . of bankruptcy judges . . . .

(b) (1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges . . . to hear and determine, with the consent of all the parties, appeals under subsection (a) . . . .

(c) . . . [E]ach appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel . . . unless . . . [any party elects] to have such appeal heard by the district court. . . .

(d) (1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b). . . .

CHAPTER 7—UNITED STATES COURT OF FEDERAL CLAIMS

§171. Appointment and number of judges; character of court; designation of chief judge

(a) The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Court of Federal Claims. The court is declared to be a court established under article I of the Constitution of the United States. . . .

§172. Tenure and salaries of judges

(a) Each judge of the United States Court of Federal Claims shall be appointed for a term of fifteen years.

(b) Each judge shall receive a salary at the rate of pay, and in the same manner, as judges of the district courts of the United States. . . .

§174. Assignment of judges; decisions

(a) The judicial power of the United States Court of Federal Claims with respect to any action, suit, or proceeding, except congressional reference cases, shall be exercised by a single judge. . . .
§176. Removal from office

(a) Removal of a judge of the United States Court of Federal Claims during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability. Removal shall be by the United States Court of Appeals for the Federal Circuit, but removal may not occur unless a majority of all the judges of such court of appeals concur in the order of removal.

PART IV—JURISDICTION AND VENUE

CHAPTER 81—SUPREME COURT

§1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

§1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any
State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

CHAPTER 83—COURTS OF APPEALS

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting. . . .

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).
§1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district . . . courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district . . . .

§1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States . . . in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection;

(2) of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, . . . [with certain exceptions];

(3) of an appeal from a final decision of the United States Court of Federal Claims;

[(4) – (14) specify other matters within the Federal Circuit’s jurisdiction] . . .

CHAPTER 85—DISTRICT COURTS; JURISDICTION

§1330. Actions against foreign states

(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. . . .

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) . . .

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. . . .

[Paragraphs (3)-(5) provide exceptions to paragraph (2).]

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs. . . .

§1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.
§1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11....

§1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person... having... money or property of the value of $500 or more... if (1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property... and if (2) the plaintiff has deposited such money or property... into the registry of the court, there to abide the judgment of the court....

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

§1338. Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition

(a) The district courts 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....

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws....

§1341. Taxes by States

The district courts shall not 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.

§1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**§1345. United States as plaintiff**

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.

**§1346. United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected; . . .

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except . . . [cases] which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. . . .

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section. . . .

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States. . . .

**§1350. Alien’s action for tort**

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.
§1359. Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.
CHAPTER 87—DISTRICT COURTS; VENUE

§1390. Scope

(a) Venue defined.—As used in this chapter, the term “venue” refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

§1391. Venue generally

(a) Applicability of Section.—Except as otherwise provided by law—

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in General.—A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.

(c) Residency.—For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) Residency of Corporations in States With Multiple Districts.—For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.
§1400. Patents and copyrights, mask works, and designs

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

§1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

§1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

§1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation.

(c) Proceedings for the transfer of an action under this section may be initiated by—
   (i) the judicial panel on multidistrict litigation upon its own initiative, or
   (ii) motion filed with the panel by a party.

§1408. Venue of cases under title 11

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district—

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership.
§1409. Venue of proceedings arising under title 11 or arising in or related to cases under title 11

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending. . . .

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§1441. Removal of civil actions

(a) Generally.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship.—

(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal Law Claims and State Law Claims.—

(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1). . . .

(f) Derivative Removal Jurisdiction.—The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

§1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following 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) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity,
for or relating to 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.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

§1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States.

(c) A civil action in any State court arising under the workmen’s compensation laws of such State may not be removed to any district court of the United States.

§1446. Procedure for removal of civil actions

(a) Generally.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; Generally.—

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2) (A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.
(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) Requirements; Removal Based on Diversity of Citizenship.—

(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3) 

(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an “other paper” under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1). . . .

§1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise. . . .

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from
which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

§1453. Removal of class actions

. . . (b) In General.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of Remand Orders.—

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

§1454. Patent, plant variety protection, and copyright cases

(a) In General.—A civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights may be removed to the district court of the United States for the district and division embracing the place where the action is pending.

(b) Special Rules.—The removal of an action under this section shall be made in accordance with section 1446, except that if the removal is based solely on this section—

(1) the action may be removed by any party; and

(2) the time limitations contained in section 1446(b) may be extended at any time for cause shown.

CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

§1491. Claims against United States . . .

(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and
correction of applicable records, and such orders may be issued to any appropriate official of the United States. . . .

§1498. Patent and copyright cases

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner’s remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. . . .

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States . . . the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504(c) of title 17, United States Code . . .

§1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

§1503. Set-offs

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

PART V—PROCEDURE

CHAPTER 111—GENERAL PROVISIONS

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.
§1652. State laws as rules of decision

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.

§1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

§1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

CHAPTER 115—EVIDENCE; DOCUMENTARY

§1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

CHAPTER 131—RULES OF COURTS

§2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
§2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

§2074. Rules of procedure and evidence; submission to Congress; effective date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

§2104. Reviews of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

§2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

§2109. Quorum of Supreme Court justices absent

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing
term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

§2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

PART VI—PARTICULAR PROCEEDINGS

CHAPTER 151—DECLARATORY JUDGMENTS

§2201. Creation of remedy

(a) 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. . . .

§2202. Further relief

Further 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.

CHAPTER 153—HABEAS CORPUS

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

§2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant’s commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person’s detention pending removal proceedings.

(c)
(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)
(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)
(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court’s determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court’s factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

§2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to
collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

§2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel.—This chapter is applicable if—
(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and
(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.
(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record . . . [demonstrating that the requirements of subsection (b)(2) were satisfied].
(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.
(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court’s own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

§2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
(b) The time requirements established by subsection (a) shall be tolled—
   (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
   (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
   (3) during an additional period not to exceed 30 days, if—
      (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and
      (B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

§2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
   (1) the result of State action in violation of the Constitution or laws of the United States;
(2) the result of the Supreme Court’s recognition of a new Federal right that is made retroactively applicable; or
(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

CHAPTER 155—INJUNCTIONS; THREE-JUDGE COURTS

§2283. Stay of State court proceedings

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.

§2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. . . .

2. Selected Provisions of Title 42, United States Code

§1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

§1983. Civil action for deprivation of rights.

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§1985. Conspiracy to interfere with civil rights

. . . (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the
purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§1988. Proceedings in vindication of civil rights

. . . (b) Attorney’s fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity such officer shall not be held liable for any costs, including attorney’s fees, unless such action was clearly in excess of such officer’s jurisdiction.

(c) Expert fees. In awarding an attorney’s fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.
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