2022-2023 Supplement

Federal Courts

Cases and Materials

Second Edition

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ASPEN PUBLISHING

INTRODUCTION

This Supplement is designed to accompany the Second Edition of the Casebook. The Supplement is cumulative and contains all new materials added since the Second Edition was published in early 2019. It also contains the Constitution and relevant statutory materials.

Highlights of the Supplement include these three new principal cases:

- *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021): Considers a Texas law designed to restrict abortion and to frustrate a federal court's ability to provide relief against unconstitutional state laws.
- *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021): Explores the limits of Congress's ability to confer standing to sue.
- *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019): Holds that political gerrymandering claims present nonjusticiable political questions.

The following are the most significant new note cases:

- *Torres v. Texas Dep't of Public Safety*, 142 S. Ct. 2455 (2022): Allows suit against states under the Uniformed Services Employment and Reemployment Rights Act.
- *Egbert v. Boule*, 142 S. Ct. 1793 (2022): Narrows the availability of *Bivens* actions.
- *California v. Texas*, 141 S. Ct. 2104 (2021): Discusses standing issues regarding causation and redressability.
- *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021): Eliminates the "watershed" exception to the rule that new rules of criminal procedure do not apply retroactively in habeas cases.
- *Allen v. Cooper*, 140 S. Ct. 994 (2020): Invalidates Congress's attempt to abrogate state sovereign immunity from suit for copyright.
- *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019): Discusses standing issues regarding causation and redressability.

I thank Victoria Barnard and Michael Hill for research assistance.

J.S.
July 2022

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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 4a on p. 67:

4a. *Sierra Club* makes clear that those who oppose a government action lack standing to challenge it if it does not cause them any injury. May such parties give themselves standing by deliberately incurring a relevant injury? The answer is yes. There is no requirement that a plaintiff suffer injury fortuitously or involuntarily. For example, in *Evers v. Dwyer*, 358 U.S. 202 (1958), the Supreme Court upheld the standing of a plaintiff to challenge a Tennessee law requiring racially segregated seating on buses, even though the plaintiff had ridden on a segregated bus only once, and only "for the purpose of instituting this litigation." Similarly, the Court approved standing in *Federal Election Com'n v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022), which arose when U.S. Senator Ted Cruz lent his campaign more money than federal law permitted the campaign to repay, for the admitted purpose of giving the campaign standing to challenge the law prohibiting the repayment. The Court said that standing may be based on an injury that "could be described in some sense as willingly incurred."

Deliberately exposing oneself to injury is an important item in the toolkit of public interest litigants. In what kinds of situations would this tactic work, and in what kinds of situations would a potential plaintiff be unable to manufacture a relevant injury? If an ideologically motivated party cannot deliberately suffer a relevant injury, how else might the party create a justiciable case raising a given issue? What does the ability of plaintiffs to create standing for themselves (at least sometimes) say about the purpose and utility of standing doctrine?

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?

The issue of standing based on actions by third parties returned in *California v. Texas*, 141 S. Ct. 2104 (2021), which involved a challenge to the Patient Protection and Affordable Care Act (sometimes referred to as "Obamacare"). This statute prohibits health insurers from denying coverage or otherwise discriminating against customers based on health status. It also imposes an "individual mandate" that requires all Americans to have health insurance. As originally enacted, the act imposed a financial penalty on people who did not comply with the individual mandate. In 2017, however, Congress amended the statute to reduce this penalty to zero. A group of states asserted that the individual mandate was therefore unconstitutional, inasmuch as the Supreme Court had previously determined that the mandate was beyond Congress's power to enact under the Commerce Clause (as Congress has no power to require everyone in America to buy something, such as health insurance), but could be enacted only pursuant to Congress's taxing power (as a tax on failing to have health insurance). *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). After the 2017 amendment the mandate could no longer be a tax, since it raised no revenue.

In an opinion by Justice Breyer, the Court held that the states lacked standing to sue. The states asserted (among other things) that whenever any of their residents signed up for Medicaid, it cost the states money. The Court, however, held that the plaintiff states had failed to demonstrate that the individual mandate *caused* any of their residents to sign up for Medicaid. Because there was no penalty for not complying with the mandate, the Court observed, it was unlikely that the mandate caused anyone to sign up for health insurance who would not have done so anyway. Two Justices dissented.

Is the Court's holding correct? Bear in mind that the states did not need to demonstrate that *many* of their residents would sign up for Medicaid because of the mandate. If even a few residents did so, it would cost the states money, and even a small monetary injury is enough for standing. Is it not plausible that at least some residents would obey the mandate simply because it is the law, even if there is no penalty attached to disobedience? What about residents who are not very sophisticated and who might not understand that the penalty for disobedience was repealed? Is the claim that the mandate would cause at least some residents to sign up for Medicaid less plausible than the claim that putting a citizenship question on the census would cause some residents not to respond to the census? Was a study necessary to prove this point?

4. Further Aspects of the Injury Requirement

a. Statutory Injuries and Congressional Control over Standing

Replace *Spokeo, Inc. v. Robins*, pp. 97-100 of the main volume, with the following:

TRANSUNION LLC v. RAMIREZ
141 S. Ct. 2190 (2021)

JUSTICE KAVANAUGH delivered the opinion of the Court. . . .

[The federal Fair Credit Reporting Act (FCRA or Act) imposes requirements on "consumer reporting agencies," which include private companies that perform credit checks. Among other things, the Act requires such companies to: (1) "follow reasonable procedures to assure maximum possible accuracy" in their reports; (2) disclose to consumers, upon request, "[a]ll information in the consumer's file at the time of the request"; and (3) provide, with each written disclosure made to a consumer, a summary of consumer rights prepared by the Consumer Financial Protection Bureau (CFPB). The Act provides that any person who willfully fails to comply with the Act with respect to any consumer is liable to that consumer for actual damages or for statutory damages of from $100 to $1000. "Statutory damages" are a fixed, minimum amount of damages that a plaintiff may recover without having to prove actual damages.

[Sergio Ramirez went to a car dealership to buy a car. When the dealership ran a credit check on him, defendant TransUnion, a private consumer reporting agency, informed the dealership that Ramirez's name matched a name on a U.S. Treasury Department "watch list" of suspected terrorists, drug traffickers, and other criminals. Ramirez was not the "Sergio Ramirez" whose name appeared on the list, but TransUnion's practice was to issue such a report whenever a consumer's first and last names matched the first and last names of someone on the list, without considering any other information. The car dealership refused to sell Ramirez a car.

[Ramirez requested his file from TransUnion. TransUnion sent him his credit file with the required statement of rights from the CFPB, but without the information that his name matched a name on the watch list. The next day, TransUnion sent Ramirez a letter informing him that his name matched a name on the watch list, but without the required statement of rights.

[Ramirez brought a class action against TransUnion asserting that TransUnion had violated the three FCRA duties listed above, because (1) TransUnion's practice of checking only whether a consumer had the same first and last names as someone on the Treasury Department's watch list did not follow "reasonable procedures to assure maximum possible accuracy," (2) TransUnion first mailing to him did not provide "all information" in his file, and (3) TransUnion's second mailing to him did not contain the required statement of consumer rights.

[The District Court certified a class of all persons to whom TransUnion had sent a mailing similar to the second mailing it sent to Ramirez. The parties stipulated that the class contained 8,185 members, but that TransUnion had disseminated the files of only 1,853 class members to potential creditors. After trial, the jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. The district court entered judgment on the verdict, and the court of appeals affirmed.]

II

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. . . . The question in this case focuses on the Article III requirement that the plaintiff's injury in fact be "concrete." . . .

What makes a harm concrete for purposes of Article III? . . . *Spokeo v. Robins*[*] indicated that

[*] [*Spokeo, Inc. v. Robins*, 578 U. S. 330 (2016), a prior case about the FCRA, established some of the standing principles that this case developed in more detail. Among other things, it established that a plaintiff's injury must be both "concrete" and "particularized" and that these are separate requirements. –Ed.]

courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. . . . *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts. . . .

[C]ertain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury. . . .

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. . . . Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. . . . [T]raditional harms may also include harms specified by the Constitution[, such as infringement of the right of free speech or free exercise of religion]. . . .

In determining whether a harm is sufficiently concrete to qualify as an injury in fact, . . . [*Spokeo*] said that Congress's views may be "instructive." . . . Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. . . . Congress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." . . . But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." . . .

[*Spokeo*] rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." . . . "Article III standing requires a concrete injury even in the context of a statutory violation." . . . Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. . . .

Under Article III, an injury in law is not an injury in fact. . . .[1] . . . In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue."[2] . . .

A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected

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[1] The lead dissent notes that the terminology of injury in fact became prevalent only in the latter half of the 20th century. That is unsurprising because until the 20th century, Congress did not often afford federal "citizen suit"-style causes of action to private plaintiffs who did not suffer concrete harms. . . .

[2] A plaintiff must show that the injury is not only concrete but also particularized. But if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of *unharmed* plaintiffs to sue any defendants who violate any federal law. (Congress might, for example, provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law.) That is one reason why the Court has been careful to emphasize that concreteness and particularization are separate requirements. . . .

branches when necessary to decide an actual case." . . . But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). . . .[3]

III

. . . [The 1,853 class members whose reports were disseminated to third-party businesses suffered a concrete injury giving rise to Article III standing.] This injury bears a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation. . . . [This is so even though the traditional action for defamation required a plaintiff to show that the defendant published a *false* statement about the plaintiff, and TransUnion's statement that a plaintiff's name matched a name on the watch list was true. In] looking to whether a plaintiff's asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement. . . .

The remaining 6,332 class members are a different story. [TransUnion's files on these class members were never disseminated to potential creditors.] . . . Publication is "essential to liability" in a suit for defamation. . . . [T]here is "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." . . .

[P]laintiffs advance a separate argument based on an asserted *risk of future harm*. They say that . . . [the misleading statement] in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm. . . . [*Spokeo*] said that "the risk of real harm" . . . can sometimes "satisfy the requirement of concreteness."

[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring . . . [But] in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm.[7] . . .

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[3] . . . [T]he dissent's theory would largely outsource Article III to Congress. As we understand the dissent's theory, a suit seeking to enforce "general compliance with regulatory law" would not suffice for Article III standing because such a suit seeks to vindicate a duty owed to the whole community. . . . But under the dissent's theory, so long as Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to individuals, any suit to vindicate that obligation suddenly suffices for Article III. Suppose, for example, that Congress passes a law purporting to give all American citizens an individual right to clean air and clean water, as well as a cause of action to sue and recover $100 in damages from any business that violates any pollution law anywhere in the United States. The dissent apparently would find standing in such a case. We respectfully disagree. In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.

[7] For example, a plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress. . . . The plaintiffs here have not relied on such a theory of Article III harm. . . .

[T]he 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate . . . alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit. Nor did those plaintiffs present evidence that the class members . . . suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses. Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing. . . . [T]he 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm. . . .

B

. . . [Plaintiffs also claim that TransUnion violated its statutory duties to disclose "all" information in their credit files on request and to provide a CFPB-approved statement of rights with each disclosure. Because TransUnion's two mailings together provided all the information the FRCA required, these claims effectively assert that TransUnion's mailings were formatted incorrectly. But the] plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. . . . In fact, they do not demonstrate that they suffered any harm *at all* from the formatting violations. The plaintiffs presented no evidence that, other than Ramirez, "a single other class member so much as *opened* the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." . . . Without any evidence of harm caused by the format of the mailings, these are "bare procedural violation[s], divorced from any concrete harm." . . . That does not suffice for Article III standing. . . .

[T]he United States as *amicus curiae* . . . asserts that the plaintiffs suffered a concrete "informational injury." . . . See *Federal Election Comm'n v. Akins*. . . . We disagree. The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it *in the wrong format*. Therefore, *Akins* . . . [does] not control here. In addition, [that case] involved denial of information subject to [a public-disclosure law] that entitle[d] all members of the public to certain information. This case does not involve such a public-disclosure law. . . . Moreover, the plaintiffs have identified no "downstream consequences" from failing to receive the required information. . . . They did not demonstrate, for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties. An "asserted informational injury that causes no adverse effects cannot satisfy Article III." . . .

No concrete harm, no standing. . . . We reverse the judgment . . . and remand the case for further proceedings consistent with this opinion. . . .

JUSTICE THOMAS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

. . . At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. . . . Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. . . . Courts typically did not require any showing of actual damage. . . . But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required "not only *injuria* [legal injury] but also *damnum* [damage]." . . .

This distinction mattered not only for traditional common-law rights, but also for newly

created statutory ones. The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder "could not show monetary loss." . . . [Similarly, in a 19th-century patent case in which the defendant claimed that merely *making* a patented machine could not, by itself, cause any damage to the owner of the patent if the machine were never used or sold, Justice Story, riding circuit,] rejected that theory, noting that the plaintiff could sue in federal court merely by alleging a violation of a private right: "[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage." . . .

The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. [*E.g.*,] *Havens Realty Corp. v. Coleman* ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"). . . . In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery ..., there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss." . . .

B

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. . . . All three of those duties are owed to individuals, not to the community writ large. . . . [The duty] to use reasonable procedures to assure maximum possible accuracy . . . is particularized to an individual: the subject of the report. . . . [The duties to] provide all information in the consumer's file and accompany the disclosure with a summary of rights . . . [are also] owed to a single person: the consumer who requests the information. . . .

If a consumer reporting agency breaches any FCRA duty owed to a specific consumer, then that individual (not all consumers) may sue the agency. . . . The plaintiffs thus have a sufficient injury to sue in federal court. . . .

Rejecting this history, the majority holds that the mere violation of a personal legal right is *not*—and never can be—an injury sufficient to establish standing. . . . "No concrete harm, no standing." . . .

That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970 . . . that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing. . . . And the concept then was not even about constitutional standing; it concerned a *statutory* cause of action under the Administrative Procedure Act. See [*ADAPSO v. Camp*]. . . .

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. . . . But even then, injury in fact served as an *additional* way to get into federal court. Article III injury still could "exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " . . . A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right *or* by alleging some *other* type of "personal interest." . . .

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan v. Defenders of Wildlife*, . . . for example, the Court concluded that several environmental organizations lacked standing . . . [despite] a citizen-suit provision allowing . . . ["any person" to sue for enforcement of] the law. . . . Echoing the historical distinction between

duties owed to individuals and those owed to the community, the Court explained that . . . "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." . . .

A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. . . . A statute that creates a private right and a cause of action, however, *does* gives plaintiffs an adequate interest in vindicating their private rights in federal court. . . .

Never before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, . . . this Court has relieved the legislature of its power to create and define rights.

III

Even assuming that this Court should be in the business of second-guessing private rights, this is a rather odd case to say that Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress. . . .

[Justice Thomas argued that the plaintiffs should have standing even under the majority's test, because (1) "the unlawful withholding of requested information causes a sufficiently distinct injury to provide standing to sue," so the plaintiffs had standing with regard to their claim that TransUnion had not sent them all the information in their files, and (2) even the plaintiffs whose misleading reports were never disseminated to potential creditors established a sufficient *risk* of harm to have standing, inasmuch as the record showed that 25% of the misleading files were disseminated within a 7-month period, and a 25% risk is substantial enough for standing.]

I respectfully dissent.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

. . . I differ with JUSTICE THOMAS on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. . . . But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." . . . I continue to adhere to that view, but think it should lead to the same result as JUSTICE THOMAS's approach in all but highly unusual cases. . . . Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join JUSTICE THOMAS's dissent in full.

Notes and Questions

1. Previous cases had long held that a plaintiff's injury must be "concrete and particularized," but the 2016 *Spokeo* case cited in *TransUnion* was the first case to state clearly that these are two separate requirements. Does that make sense? In what kinds of cases might a plaintiff's injury be particularized but not concrete?

2. What does this case say about the relationship between the old "injury to legal rights" test and the modern "injury in fact" test? What does it say about Congress's ability to confer standing by statute? Is the case consistent with *Havens Realty*? If not, what is the status of

Havens Realty now?

Should Congress always be able to confer a right on a plaintiff and give a cause of action for violation of that right? Or should a court be able to reject Congress's judgment in some situations, and if so, which? The Court says that a plaintiff does not "automatically" satisfy the injury requirement whenever the plaintiff suffers a violation of a statutory right conferred by Congress, but that courts must give "due respect" to Congress's judgment that a matter should be actionable. Did the Court give "due respect" to Congress's judgment as embodied in the FCRA?

3. Justice Thomas, dissenting, suggests that the key distinction is between cases in which Congress seeks to give plaintiffs a new *private* right and cases where Congress attempts to empower plaintiffs to sue to vindicate *public* rights. Is this distinction clear? Is it convincing? Does the majority's footnote 3 accurately describe Justice Thomas's position?

4. What is now the status of the many statutes that provide for statutory damages for violation of a plaintiff's rights? For example, if a defendant produces unlawful copies of a plaintiff's copyrighted work, but the plaintiff suffers no actual damages (perhaps because the copies are never distributed), the Copyright Act authorizes statutory damages of between $750 and $30,000. 17 U.S.C. § 504. Is this statute constitutional? Another example: the Fair and Accurate Credit Transactions Act prohibits printing more than five digits of a credit card number on a receipt and provides for statutory damages of up to $1000 for willful noncompliance. 15 U.S.C. §§ 1681c, 1681n. If a receipt contains a customer's entire credit card number, but the customer suffers no monetary loss (because no one misuses the information), does the customer have standing to sue for the statutory damages?

5. Does the availability of class actions play any role in the Court's decisions on these standing issues? A single award of $1000 in statutory damages would scarcely matter to a large company such as TransUnion, but the class action in the actual case exposed it to an award of over $60 million. Do you think this consideration influenced the Court's standing decision?

6. Recall from note 4 following *Lujan v. Defenders of Wildlife* that the Supreme Court has approved the use of *qui tam* actions, in which a defendant is sued by a private plaintiff (known as the "relator") on behalf of the United States, and the relator is allowed to keep a portion of the recovery, even though the relator may not have suffered any injury. Is this rule still sound after *TransUnion*? If so, could Congress use *qui tam* actions to get around the *TransUnion* case? Suppose Congress authorized any person whose rights under the FCRA were violated to sue the offender *on behalf of the United States* for a statutory penalty of up to $1000 and provided that the relator could retain 99% of the recovery. Would that take care of the problem?

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, striking down a state law as unconstitutional does not injure 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 districts would change its membership. Noting that the membership of the House was determined by the voting public, the Court held that changes to the membership 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 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

1. The Basic Rule of Mootness

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).

Even a claim for *nominal* damages may save a case from being moot. Nominal damages (i.e., damages in a trivial sum, such as one dollar) were traditionally awarded to a plaintiff who proved a violation of his or her rights but who did not, and perhaps could not, prove actual damages. For example, nominal damages could be awarded to a plaintiff who proved that the defendant unlawfully set foot on her property, even though no damage occurred thereby.

In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), plaintiff Uzuegbunam, a student at a state university, sued university officials after university police, enforcing university regulations, stopped him from distributing religious literature to his fellow students. Uzuegbunam sought nominal damages and injunctive relief for violation of his First Amendment rights. While the lawsuit was pending, the school abolished the challenged regulations. The defendants claimed that the case was moot, but the Supreme Court, in an opinion by Justice Thomas, held that Uzuegbunam's claim for nominal damages could proceed. Nominal damages, the Court held, would provide some, even if only partial, redress for the plaintiff's injury, which was sufficient to avoid mootness. The Chief Justice dissented. (The plaintiff did not attempt to rely on the "voluntary cessation" exception to mootness.)

What is the implication of *Uzuegbunam* for mootness doctrine? Does it suggest that plaintiffs such as DeFunis might have avoided a mootness dismissal if only they had thought to include a claim for nominal damages? *Uzuegbunam* noted that a claim for nominal damages does not always generate a justiciable case. A plaintiff claiming nominal damages must prove all elements of such a case; Uzuegbunam had done so because he experienced a "completed violation" of his constitutional rights when the defendants enforced their regulations against him. Thus, plaintiffs who never experienced a particularized injury in the first place (*see*, *e.g.*, *Sierra Club v. Morton*; *United States v. Richardson*, Chapter I.C, *supra*) might gain no benefit by claiming nominal damages. But assuming a plaintiff has standing to get a case started, would a claim for nominal damages necessarily ensure that the case cannot become moot?

2. Exceptions to Mootness Doctrine (or Applications of It?)

c. Voluntary Cessation

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?

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 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." . . .

III

A

Any standard for resolving [partisan gerrymandering] 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 "provid[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." . . .

B

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. . . . [They] 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.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE 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.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." . . . The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." . . .

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. . . . [B]oth 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 nonjusticiable 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 nonjusticiable 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 "anomalous judicial failure to formulate a manageable standard under which litigation could occur" with regard to partisan gerrymandering? *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274 (2006).

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?

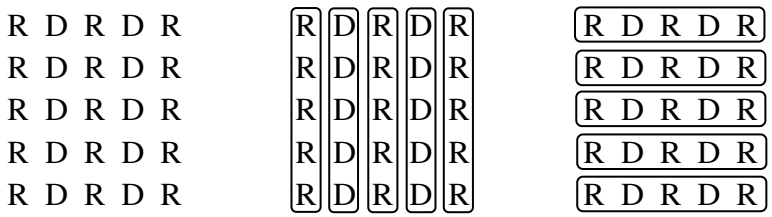

Figure A Figure B Figure C

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

A. "Jurisdiction Stripping"

2. Constraints on Congress's Power over Jurisdiction

a. "External" Constraints

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

B. Federal Common Law

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.

C. Rights of Action

Add a new note on p. 453:

10. When an implied right of action is available, how is one to know the contours of that action? How does one know, for example, what kinds of damages are recoverable?

In *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), the Supreme Court addressed this issue in the important context of implied rights of action under laws that prohibit discrimination by recipients of federal funds. Such laws include Title IX of the Education Amendments, which prohibits sex discrimination by universities receiving federal financial assistance; Title VI of the Civil Rights Act of 1964, which prohibits race, color, and national origin discrimination in federally funded programs or activities; the Rehabilitation Act, which prohibits discrimination based on disability by recipients of federal funds; and the Affordable Care Act, which prohibits discrimination on any of the foregoing grounds by healthcare entities receiving federal funds. The Supreme Court has held that the first two of these laws provide an implied right of action, and the latter two expressly incorporate the remedies of Title VI.

Cummings, who was deaf, sued a healthcare provider under the Rehabilitation Act and the Affordable Care Act when the provider refused to provide a sign language interpreter at her appointments. She sought damages for the "humiliation, frustration, and emotional distress" that

she claimed the provider had caused her. The Supreme Court held that damages for emotional harm were not recoverable under the two statutes.

The Court held that Spending Clause statutes such as the Rehabilitation Act are analogous to a contract between the federal government and a recipient of federal funds, in which the government provides funds and the recipient promises not to discriminate. Accordingly, the Court held, relief for a violation of such a statute is limited to forms of relief that a recipient of federal funds would have understood to be implicit terms of the contract it was agreeing to by accepting the funds, which, in turn, would be the forms of relief usually available in actions for breach of contract. Compensatory damages and injunctive relief are typically available in such actions, but damages for emotional distress are generally not, and therefore, the Court held, such damages are not available in a suit based on the implied right of action under a Spending Clause statute. Three Justices dissented.

In light of *Cummings*, how would one determine what damages are available in a suit based on an implied right of action under a statute that is not a Spending Clause statute? What does the difficulty of determining what kinds of damages are compensable in suits based on an implied right of action say about the whole concept of implied rights of action?

Updates to Chapter 7

D. Methods of Avoiding State Sovereign Immunity

Add after the first paragraph on p. 657:

In approving injunctive relief in *Ex parte Young* (p. 638, main volume), the Supreme Court relied on the unusual nature of the state statutory scheme involved, which not only infringed constitutional rights, but imposed severe penalties that inhibited any party from challenging the law by violating it and then raising its unconstitutionality as a defense in state court proceedings. In subsequent cases, however, the Court approved prospective injunctive relief against state officials even when this obstacle to raising a constitutional challenge defensively was absent. *See*, *e.g.*, *Verizon Maryland, Inc. v. Public Serv. Comm'n. of Maryland*, 535 U.S 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' "). But what if an allegedly unconstitutional state law *does* impose severe penalties that inhibit parties from challenging it defensively, but state officials play no role in the enforcement of the law? Would a party who believes the law to be unconstitutional have any way to mount a pre-enforcement challenge to it in federal court?

WHOLE WOMAN'S HEALTH v. JACKSON
142 S. Ct. 522 (2021)

JUSTICE GORSUCH announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C. . . .

I

. . . Texas passed the Texas Heartbeat Act, . . . also known as S.B. 8. The Act prohibits physicians from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the

physician detected a fetal heartbeat for the unborn child" unless a medical emergency prevents compliance. . . . But the law generally does not allow state officials to bring criminal prosecutions or civil enforcement actions. Instead, S.B. 8 directs enforcement "through ... private civil actions" culminating in injunctions and statutory damages awards against those who perform or assist prohibited abortions. . . . The law also provides a defense. Tracking language from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the statute permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an "undue burden" on women seeking abortions.[1] . . .

[Some abortion providers brought a pre-enforcement suit challenging S.B. 8's constitutionality in state court.] Another group of providers, including the petitioners before us, filed a pre-enforcement action in federal court. In their complaint, the petitioners alleged that S.B. 8 violates the Federal Constitution and sought an injunction barring the following defendants from taking any action to enforce the statute: a state-court judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young; and a single private party, Mark Lee Dickson.

Shortly after the petitioners filed their federal complaint, the individual defendants employed by Texas moved to dismiss, citing among other things the doctrine of sovereign immunity. . . . The sole private defendant, Mr. Dickson, also moved to dismiss, claiming that the petitioners lacked standing to sue him. . . . The District Court denied the motions. . . . [Defendants took an interlocutory appeal. Petitioners sought an injunction suspending S.B. 8's enforcement, which was denied. Petitioners then sought certiorari before judgment, which the Supreme Court granted.]

II

. . . As with any interlocutory appeal, our review is limited to the particular orders under review and any other ruling "inextricably intertwined with" or "necessary to ensure meaningful review of" them. . . . [T]he ultimate merits question—whether S.B. 8 is consistent with the Federal Constitution—is not before the Court. Nor is the wisdom of S.B. 8 as a matter of public policy.

A

. . . [W]e begin with the sovereign immunity appeal involving the state-court judge, Austin Jackson, and the state-court clerk, Penny Clarkston. . . .

Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity. . . . To be sure, in *Ex parte Young*, Ex parte Young, [209 U.S. 123 (1908),] this Court recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law. . . . But . . . this traditional exception does not normally permit federal courts to issue injunctions against state-

[1] JUSTICE SOTOMAYOR suggests that the defense described in S.B. 8 supplies only a "shell of what the Constitution requires" and effectively "nullif[ies]" its guarantees. . . . But whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted. See U. S. Const., Art. VI.

court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties. If a state court errs in its rulings, too, the traditional remedy has been some form of appeal, including to this Court, not the entry of an *ex ante* injunction preventing the state court from hearing cases. As *Ex parte Young* put it, "an injunction against a state court" or its "machinery" "would be a violation of the whole scheme of our Government." . . .

Nor is that the only problem confronting the petitioners' court-and-clerk theory. Article III of the Constitution affords federal courts the power to resolve only "actual controversies arising between adverse litigants." *Muskrat v. United States*, 219 U.S. 346, 361 (1911). Private parties who seek to bring S.B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them generally are not. Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies, . . . not to wage battle as contestants in the parties' litigation. As this Court has explained, "no case or controversy" exists "between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Pulliam v. Allen*, 466 U.S. 522, 538, n.18 (1984).

Then there is the question of remedy. Texas Rule of Civil Procedure 24 directs state-court clerks to accept complaints and record case numbers. The petitioners have pointed to nothing in Texas law that permits clerks to pass on the substance of the filings they docket—let alone refuse a party's complaint based on an assessment of its merits. Nor does Article III confer on federal judges some "amorphous" power to . . . reimagine . . . the job description of Texas state-court clerks. . . .

Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory. If it caught on and federal judges could enjoin state courts and clerks from entertaining disputes between private parties under *this* state law, what would stop federal judges from prohibiting state courts and clerks from hearing and docketing disputes between private parties under *other* state laws? And if the state courts and clerks somehow qualify as "adverse litigants" for Article III purposes in the present case, when would they not? The petitioners offer no satisfactory answers.

Instead, only further questions follow. Under the petitioners' theory, would clerks have to assemble a blacklist of banned claims subject to immediate dismissal? . . . How notorious would the alleged constitutional defects of a claim have to be before a state-court clerk would risk legal jeopardy merely for filing it? . . . Could federal courts enjoin those who perform other ministerial tasks potentially related to litigation, like the postal carrier who delivers complaints to the courthouse? . . .

Our colleagues writing separately today supply no answers either. They agree that state-court judges are not proper defendants in this lawsuit because they are "in no sense adverse" to the parties whose cases they decide. . . . At the same time, . . . they would allow this case to proceed against clerks. . . . But in doing so they fail to address the many remedial questions their path invites. . . .

JUSTICE SOTOMAYOR seems to admit at least part of the problem. She concedes that older "wooden" authorities like *Ex parte Young* appear to prohibit suits against state-court clerks. . . . Still, she insists, we should disregard those cases in favor of more "modern" case law. . . . But even overlooking all the other problems attending our colleagues' "clerks-only" theory, the authorities they cite do not begin to do the work attributed to them.

Most prominently, our colleagues point to *Pulliam*. But that case had nothing to do with state-court clerks, injunctions against them, or the doctrine of sovereign immunity. Instead, the Court faced only the question whether the suit before it could proceed against a judge consistent with the distinct doctrine of judicial immunity. . . . Tellingly, our colleagues do not read *Pulliam* to authorize claims against state-court judges in this case. And given that, it is a mystery how they might invoke the case as authority for claims against (only) state-court clerks, officials *Pulliam* never discussed.

. . . [T]he remainder of our colleagues' cases are even further afield. *Mitchum* v. *Foster* did not involve state-court clerks, but a judge, prosecutor, and sheriff. . . . *Shelley* v. *Kraemer* did not even involve a pre-enforcement challenge against any state-official defendant. . . . [T]he petitioners simply sought to raise the Constitution as a *defense* against other private parties seeking to enforce a restrictive covenant . . . much as the petitioners here would be able to raise the Constitution as a defense in any S.B. 8 enforcement action brought . . . against them. . . . Simply put, nothing in any of our colleagues' cases supports their novel suggestion that we should allow a pre-enforcement action for injunctive relief against state-court clerks, all while simultaneously holding the judges they serve immune.

B

Perhaps recognizing the problems with their court-and-clerk theory, the petitioners briefly advance an alternative. They say they seek to enjoin the Texas attorney general from enforcing S.B. 8. Such an injunction, the petitioners submit, would also automatically bind any private party who might try to bring an S.B. 8 suit against them. . . .

While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S.B. 8 that a federal court might enjoin him from exercising. . . .

Even if . . . the attorney general did have some enforcement authority under S.B. 8, the petitioners have identified nothing that might allow a federal court to parlay that authority, or any defendant's enforcement authority, into an injunction against any and all unnamed private persons who might seek to bring their own S.B. 8 suits. The equitable powers of federal courts are limited by historical practice. . . . [A] federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may "lawfully enjoin the world at large," . . . or purport to enjoin challenged "laws themselves," . . . .

Our colleagues offer no persuasive reply to this problem. . . . JUSTICE SOTOMAYOR . . . says . . . that the State of Texas in S.B. 8 has "delegat[ed] its enforcement authority to the world at large." . . . But somewhat analogous complaints could be levied against private attorneys general acts, statutes allowing for private rights of action, tort law, federal antitrust law, and even the Civil Rights Act of 1964. In some sense all of these laws "delegate" the enforcement of public policy to private parties and reward those who bring suits with "bount[ies]" like exemplary or statutory damages and attorney's fees. Nor does JUSTICE SOTOMAYOR explain where her novel plan to overthrow this Court's precedents and expand the equitable powers of federal courts would stop . . . .

C

While this Court's precedents foreclose some of the petitioners' claims for relief, others survive. The petitioners also name as defendants Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young. . . . [I]t appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S.B. 8. . . . Accordingly, we hold that sovereign immunity does not bar the petitioners' suit against these named defendants at the motion to dismiss stage.

JUSTICE THOMAS alone reaches a different conclusion. He emphasizes that suits seeking equitable relief against executive officials are permissible only when supported by tradition . . . [and] that the relevant tradition here, embodied in *Ex parte Young*, permits equitable relief against only those officials who possess authority to enforce a challenged state law. . . . We agree with all of these principles; our disagreement is restricted to their application.

JUSTICE THOMAS suggests that the licensing-official defendants lack authority to enforce S.B. 8 because that statute says it is to be "exclusively" enforced through private civil actions. . . . [But] S.B. 8 *also* states that the law "may not be construed to ... limit the enforceability of any other laws that regulate or prohibit abortion." . . . Texas Occupational Code § 164.055 . . . states that the Texas Medical Board "shall take an appropriate disciplinary action against a physician who violates ... Chapter 171, Health and Safety Code," . . . [which] *includes* S.B. 8. . . . Of course, Texas courts and not this one are the final arbiters of the meaning of state statutory directions. . . . But . . . it appears that the licensing defendants do have authority to enforce S.B. 8.

. . . JUSTICE THOMAS . . . [also] stresses that to maintain a suit . . .["it is not enough that petitioners feel inhibited or chill[ed]"] . . . by the abstract possibility of an enforcement action against them. . . . [T]hey must show at least a credible threat of such an action against them. . . . Again, we agree with these observations in principle and disagree only on their application to the facts of this case. The petitioners have plausibly alleged that S.B. 8 has already had a direct effect on their day-to-day operations. . . . And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S.B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

D

. . . Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S.B. 8 suit against them. Mr. Dickson has supplied sworn declarations so attesting. . . . The petitioners do not contest this. . . . Accordingly, on the record before us the petitioners cannot establish "personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct." . . . No Member of the Court disagrees with this resolution of the claims against Mr. Dickson.

III

. . . JUSTICE SOTOMAYOR charges this Court with "shrink[ing]" from the task of defending the supremacy of the Federal Constitution over state law. . . . That rhetoric bears no relation to reality.

. . . [M]any paths exist to vindicate the supremacy of federal law in this area. Even aside from the fact that eight Members of the Court agree sovereign immunity does not bar the petitioners from bringing this pre-enforcement challenge in federal court, everyone acknowledges that other pre-enforcement challenges may be possible in state court as well. . . . Separately, any individual sued under S.B. 8 may pursue state and federal constitutional arguments in his or her defense. . . . Still further viable avenues to contest the law's compliance with the Federal Constitution also may be possible; we do not prejudge the possibility. Given all this, JUSTICE SOTOMAYOR's suggestion that the Court's ruling somehow "clears the way" for the "nullification" of federal law along the lines of what happened in the Jim Crow South not only wildly mischaracterizes the impact of today's decision, it cheapens the gravity of past wrongs . . .

. . . [T]hose seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. In fact, general federal question jurisdiction did not even exist for much of this Nation's history. . . . [M]any federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (First Amendment used as a defense to a state tort suit).

Finally, JUSTICE SOTOMAYOR contends that S.B. 8 "chills" the exercise of federal constitutional rights. If nothing else, she says, this fact warrants allowing further relief in this case. . . . [T]he "chilling effect" associated with a potentially unconstitutional law being "on the books" is insufficient to "justify federal intervention" in a pre-enforcement suit. . . . Instead, this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice. . . . The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right. The petitioners are not entitled to a special exemption.

. . . To the extent JUSTICE SOTOMAYOR seems to wish even *more* tools existed to combat this type of law, Congress is free to provide them. . . . But one thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day. . . .

The order of the District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part II–C of the Court's opinion. In my view, petitioners may not maintain suit against any of the governmental respondents under *Ex parte Young*, 209 U.S. 123 (1908). . . .

[T]here is no freestanding constitutional right to pre-enforcement review in federal court. . . . Such a right would stand in significant tension with the longstanding Article III principle that federal courts generally may not "give advisory rulings on the potential success of an affirmative defense before a cause of action has even accrued." . . .

[A] party subject to imminent threat of state enforcement proceedings may seek a kind of pre-enforcement review in the form of a "negative injunction." This procedural device permits a party to assert "in equity ... a defense that would otherwise have been available in the State's enforcement proceedings at law." . . . In *Ex parte Young*, this Court recognized that use of this negative injunction against a governmental defendant provides a narrow exception to sovereign immunity. . . . That exception extends no further than permitting private parties in some

circumstances to prevent state officials from bringing an action to enforce a state law that is contrary to federal law. . . .

[A] federal court's jurisdiction in equity extends no further than "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." . . . Federal courts therefore lack "power to create remedies previously unknown to equity jurisprudence." . . . [T]he four licensing-official respondents are [not] appropriate defendants under *Ex parte Young*. . . .

[A]n *Ex parte Young* defendant must have "some connection with the enforcement of the act"—*i.e.*, "the right and the power to enforce" the "act alleged to be unconstitutional.". . . The only "act alleged to be unconstitutional" here is S.B. 8. And that statute explicitly denies enforcement authority to any governmental official. . . .

The principal opinion . . . finds residual enforcement authority for the licensing officials elsewhere in S.B. 8. . . . [Justice Thomas explained why he disagreed with the Court's interpretation of S.B. 8 as a matter of statutory interpretation.]

[E]ven when there is an appropriate defendant to sue, a plaintiff may bring an action under *Ex parte Young* only when the defendant "threaten[s] and [is] about to commence proceedings." . . . "[T]he prospect of state suit must be imminent." . . . Here, none of the licensing officials has threatened enforcement proceedings against petitioners because none has authority to bring them. . . .

[P]etitioners complain of the "chill" S.B. 8 has on the purported right to abortion. But as our cases make clear, it is not enough that petitioners "feel inhibited" because S.B. 8 is "on the books." *Younger* v. *Harris*, 401 U. S. 37, 42 (1971). Nor is a "vague allegation" of potential enforcement permissible. . . . To sustain suit against the licensing officials, whether under Article III or *Ex parte Young*, petitioners must show at least a credible and specific threat of enforcement to rescind their medical licenses or assess some other penalty under S.B. 8. . . .

I would instruct the District Court to dismiss this case against all respondents . . . .

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in the judgment in part and dissenting in part.

Texas has passed a law banning abortions after roughly six weeks of pregnancy. . . . That law is contrary to this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). It has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.

Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. To cite just a few, the law authorizes "[a]ny person," other than a government official, to bring a lawsuit against anyone who "aids or abets," or intends to aid or abet, an abortion performed after roughly six weeks; has special preclusion rules that allow multiple lawsuits concerning a single abortion; and contains broad venue provisions that allow lawsuits to be brought in any of Texas's 254 far flung counties, no matter where the abortion took place. . . . The law then provides for minimum liability of $10,000 plus costs and fees, while barring defendants from recovering their own costs and fees if they prevail. . . . It also purports to impose backward-looking liability should this Court's precedents or an injunction preventing enforcement of the law be overturned. . . . And it forbids many state officers from directly enforcing it. . . .

These provisions, among others, effectively chill the provision of abortions in Texas. . . . As eight Members of the Court agree, . . . petitioners may bring a pre-enforcement suit challenging

the Texas law in federal court under *Ex parte Young*, 209 U.S. 123 (1908), because there exist state executive officials who retain authority to enforce it. . . .

In my view, several other respondents are also proper defendants. First, under Texas law, the Attorney General maintains authority coextensive with the Texas Medical Board to address violations of S.B. 8. . . . [Chief Justice Roberts explained why he believed the Texas Attorney General had this authority as a matter of state law.] He accordingly also falls within the scope of *Young*'s exception to sovereign immunity. . . .

The same goes for Penny Clarkston, a court clerk. Court clerks, of course, do not "usually" enforce a State's laws. . . . But by design, the mere threat of even unsuccessful suits brought under S.B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed. Under these circumstances, the court clerks who issue citations and docket S.B. 8 cases are unavoidably enlisted in the scheme to enforce S.B. 8's unconstitutional provisions, and thus are sufficiently "connect[ed]" to such enforcement to be proper defendants. . . . The role that clerks play with respect to S.B. 8 is distinct from that of the judges. Judges are in no sense adverse to the parties subject to the burdens of S.B. 8. But as a practical matter clerks are—to the extent they "set[] in motion the machinery" that imposes these burdens on those sued under S.B. 8. . . .

The majority contends that this conclusion cannot be reconciled with *Young*, pointing to language in *Young* that suggests it would be improper to enjoin courts from exercising jurisdiction over cases. . . . Decisions after *Young*, however, recognize that suits to enjoin state court proceedings may be proper. See *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); see also *Pulliam v. Allen*, 466 U.S. 522, 525 (1984). And this conclusion is consistent with the entire thrust of *Young* itself. Just as in *Young*, those sued under S.B. 8 will be "harass[ed] ... with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment." . . . Under these circumstances, where the mere "commencement of a suit," and in fact just the threat of it, is the "actionable injury to another," the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme. . . . Any novelty in this remedy is a direct result of the novelty of Texas's scheme.

. . . The clear purpose and actual effect of S.B. 8 has been to nullify this Court's rulings. It is, however, a basic principle that the Constitution is the "fundamental and paramount law of the nation," and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137 (1803). Indeed, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." . . . The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, concurring in the judgment in part and dissenting in part. . . .

I

. . . S.B. 8 authorizes any person—who need not have any relationship to the woman, doctor, or procedure at issue—to sue, for at least $10,000 in damages, anyone who performs, induces, assists, or even intends to assist an abortion in violation of Texas' unconstitutional 6-week ban. . . .

. . . S.B. 8 also modifies state-court procedures to make litigation uniquely punitive for those sued. It allows defendants to be haled into court in any county in which a plaintiff lives, even if

that county has no relationship to the defendants or the abortion procedure at issue. . . . It gives the plaintiff a veto over any venue transfer, regardless of the inconvenience to the defendants. . . . It prohibits defendants from invoking nonmutual issue or claim preclusion, meaning that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct. . . . It also bars defendants from relying on any nonbinding court decision, such as persuasive precedent from other trial courts. . . . Although it guarantees attorney's fees and costs to prevailing plaintiffs, . . . it categorically denies them to prevailing defendants, . . . so they must finance their own defenses no matter how frivolous the suits. . . .

S.B. 8 further purports to limit the substantive defenses that defendants may raise. It permits what it calls an "undue burden" defense, but redefines that standard to be a shell of what the Constitution requires . . . . It further purports to impose retroactive liability for abortion care provided while the law is enjoined if the injunction is later overturned on appeal . . . as well as for abortion care provided while *Roe* and *Casey* are in effect if this Court later overrules one of those cases.

. . . As a whole, these provisions go beyond imposing liability on the exercise of a constitutional right. If enforced, they prevent providers from seeking effective pre-enforcement relief (in both state and federal court) while simultaneously depriving them of effective post-enforcement adjudication, potentially violating procedural due process. . . .

II

This Court has confronted State attempts to evade federal constitutional commands before, including schemes that forced parties to expose themselves to catastrophic liability as state-court defendants in order to assert their rights. . . .

In [*Ex parte*] *Young*, the Court considered a Minnesota law fixing new rates for railroads and adopting high fines and penalties for failure to comply with the rates. . . . The law purported to provide no option to challenge the new rates other than disobeying the law and taking "the risk ... of being subjected to such enormous penalties." . . . Because the railroad officers and employees "could not be expected to disobey any of the provisions ... at the risk of such fines and penalties," the law effectively resulted in "a denial of any hearing to the company." . . .

The Court unequivocally rejected this design. Concluding that the legislature could not "preclude a resort to the courts ... for the purpose of testing [the law's] validity," the Court decided the companies could obtain pre-enforcement relief by suing the Minnesota attorney general based on his "connection with the enforcement" of the challenged act[,] . . . despite the fact that the attorney general's only such connection was the "general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question." . . . Over the years, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " . . .

Like the stockholders in *Young*, abortion providers face calamitous liability from a facially unconstitutional law. . . . [T]he threat is not just the possibility of money judgments; it is also that, win or lose, providers may be forced to defend themselves against countless suits, all across the State, without any prospect of recovery for their losses or expenses. Here, as in *Young*, the "practical effect of [these] coercive penalties for noncompliance" is "to foreclose all access to the courts," "a constitutionally intolerable choice." . . .

Under normal circumstances, providers might be able to assert their rights defensively in state court. . . . These are not normal circumstances. S.B. 8 is structured to thwart review and result in "a denial of any hearing." . . . That is precisely what the Court in *Young* sought to avoid. . . .

[S]tate-court clerks are proper defendants in this action. This Court has long recognized that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). In *Shelley*, private litigants sought to enforce restrictive racial covenants designed to preclude Black Americans from home ownership and to preserve residential segregation. The Court explained that these ostensibly private covenants involved state action because "but for the active intervention of the state courts, supported by the full panoply of state power," the covenants would be unenforceable. . . . S.B. 8's formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S.B. 8 cases with lopsided procedures and limited defenses. Because these state actors are necessary components of that chilling effect and play a clear role in the enforcement of S.B. 8, they are proper defendants.

. . . The Court . . . hides behind a wooden reading of *Young*, stitching out-of-context quotations into a cover for its failure to act decisively. . . . Modern cases, however, have recognized that suit may be proper even against state-court judges, including to enjoin state-court proceedings. See *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); see also *Pulliam v. Allen*, 466 U.S. 522, 525 (1984). The Court responds that these cases did not expressly address sovereign immunity or involve court clerks. . . . If language in *Young* posed an absolute bar to injunctive relief against state-court proceedings and officials, however, these decisions would have been purely advisory.

Moreover, the Court has emphasized that "the principles undergirding the *Ex parte Young* doctrine" may "support its application" to new circumstances, "novelty notwithstanding." . . . Because S.B. 8's architects designed this scheme to evade *Young* as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty.[3]

Next, the Court claims that *Young* cannot apply because state-court clerks are not adverse to the petitioners. . . . As THE CHIEF JUSTICE explains, however, . . . the Texas Legislature has ensured that docketing S.B. 8 cases is anything but a neutral action. With S.B. 8's extreme alterations to court procedure and substantive defenses, the Texas court system no longer resembles a neutral forum for the adjudication of rights. . . . Under these circumstances, the parties are sufficiently adverse.

Finally, the Court raises "the question of remedy." . . . The Court should have afforded the District Court an opportunity to craft appropriate relief before throwing up its hands and declaring the task unworkable. For today's purposes, the answer is simple: If . . . S.B. 8 is unconstitutional, contrary state rules of civil procedure must give way. See U. S. Const., Art. VI, cl. 2 [the Supremacy Clause] . . . .

. . .[T]he Court also complains that the petitioners offer no "meaningful limiting principles for their theory." . . . That is incorrect. The petitioners explain: "Where, as here, a State law (1) deliberately seeks to evade federal judicial review by outsourcing enforcement of the law to

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[3] . . . No one contends . . . that pre-enforcement review should be available whenever a state law chills the exercise of a constitutional right. Rather, as this Court explained in *Young*, pre-enforcement review is necessary "when the penalties for disobedience are ... so enormous" as to have the same effect "as if the law in terms prohibited the [litigant] from seeking judicial construction of laws which deeply affect its rights." . . .

private individuals without any personal stake, while forbidding state executive officials from direct enforcement; and (2) creates special rules for state-court adjudication to maximize harassment and make timely and effective protection of constitutional rights impossible, federal relief against clerks is warranted." . . . The petitioners do not argue that pre-enforcement relief against state-court clerks should be available absent those two unique circumstances . . . .

III

My disagreement with the Court runs far deeper than a quibble over how many defendants these petitioners may sue. The dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand. . . .

. . . [At oral argument], counsel for the State conceded that pre-enforcement review would be unavailable even if a statute imposed a bounty of $1,000,000 or higher. . . . Counsel further admitted that no individual constitutional right was safe from attack under a similar scheme. . . . Counsel even asserted that a State could . . . abrogat[e] a state supreme court's power to bind its own lower courts. . . . Counsel maintained that even if a State neutered appellate courts' power in such an extreme manner, aggrieved parties' only path to a federal forum would be to violate the unconstitutional law, accede to infringement of their substantive and procedural rights all the way through the state supreme court, and then, at last, ask this Court to grant discretionary certiorari review. . . .

This is a brazen challenge to our federal structure. . . . It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to "veto" or "nullif[y]" any federal law with which they disagreed. . . .

The Nation fought a Civil War over that proposition, but Calhoun's theories were not extinguished. They experienced a revival in the post-war South, and the violence that ensued led Congress to enact . . . 42 U.S.C. § 1983. . . . [Section] 1983's "very purpose," . . . was "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " . . .

S.B. 8 raises another challenge to federal supremacy. . . . [B]y foreclosing suit against state-court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court . . . .

This is no hypothetical. New permutations of S.B. 8 are coming. . . . What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing "private" litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court. . . .

In its finest moments, this Court has ensured that constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes ... whether attempted 'ingeniously or ingenuously.' " . . . Today's fractured Court evinces no such courage. While the Court properly holds that this suit may proceed against the licensing officials, it errs gravely in foreclosing relief against state-court officials and the state attorney general. By so doing, the Court leaves all manner of constitutional rights more vulnerable than ever before, to the great detriment of our Constitution and our Republic.

Notes and Questions

1. At the time of this decision, the challenged Texas law was clearly inconsistent with Supreme Court precedent concerning the right to abortion. Six months later, however, the Court overruled *Roe v. Wade*, 410 U. S. 113 (1973), and held that the Constitution does not confer a right to abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

2. In portions of the opinions omitted above, the Justices debated whether, as a matter of statutory construction, Texas law gave state officials any role in enforcing Texas's S.B. 8, or whether enforcement was left solely to private plaintiffs. Assuming the Court was correct that some state officials had some role in enforcing S.B. 8 and could therefore be the subject of an *Ex parte Young* action, what would happen if Texas amended S.B. 8 so that it clearly and unequivocally left state officials with no role to play in its enforcement? Would the plaintiffs then simply have no means to bring a pre-enforcement challenge to the law in federal court?

3. Numerous cases in Chapter 2 ("Justiciability") show that a party who desires to have a federal court decide some issue, including whether some law is constitutional, must construct a justiciable case that raises the issue. If no justiciable case raising an issue is possible, then a federal court cannot decide the issue.

As the Court observes, it seems odd to regard a state court clerk whose job includes routinely filing complaints proffered by plaintiffs as an adverse party to a potential defendant. Is the Court correct that a suit seeking to enjoin such a clerk from filing a complaint is not a proper Article III "case"?

On the other hand, the dissenters are surely correct that S.B. 8 was constructed with the specific goals of infringing the right to abortion (under existing Supreme Court precedent), frustrating the ability of abortion providers to bring a pre-enforcement challenge to the law, and imposing such severe penalties for violating the law that abortion providers would be inhibited from violating the law and raising its unconstitutionality as a defense in subsequent state court proceedings. What should the Supreme Court do if a state passes a law that violates constitutional rights but is structured in a way that makes it practically impossible to challenge?

4. The Court and the dissenters discuss *Pulliam v. Allen*, 466 U.S. 522 (1984). In that case, the plaintiffs sued a state magistrate in federal court and challenged the constitutionality of the magistrate's practice of jailing criminal defendants who were unable to post bail in cases in which the defendants were charged with low-level misdemeanors for which jail was not a potential sentence. The defendant asserted judicial immunity, but the Supreme Court affirmed injunctive relief against the defendant. The Court noted that judges were historically subject to control via the writs of mandamus and prohibition and held that "[w]e never have had a rule of absolute judicial immunity from prospective relief." However, sovereign immunity was not mentioned, and in a footnote, the Court observed that "Article III also imposes limitations on the availability of injunctive relief against a judge." The footnote cited, apparently favorably, an appellate case that it characterized as holding that there is "no case or controversy between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." Does *Pulliam* support the Court or the dissenters?

5. The Court and the dissenters also discuss some matters covered in later chapters, including 42 U.S.C. § 1983 (*see* Chapter 8) and *Mitchum v. Foster*, 407 U.S. 225 (1972) (*see* Chapter 9).

6. Is *Ex parte Young* best viewed as a "narrow exception" to sovereign immunity, as the Court says, or as a decision resting on "principles" that should apply in "new circumstances," as Justice Sotomayor says? Which was the greater obstacle to the plaintiffs' suit, state sovereign immunity or Article III justiciability problems?

F. Congressional Abrogation of State Sovereign Immunity

Replace note 2 on p. 692 with:

2. Does *Katz* indicate that henceforth Congress's ability to abrogate state sovereign immunity should be determined on a "clause-by-clause" basis, that is, independently for each constitutional power? Or does *Seminole Tribe*'s broad statement that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" still cover all Article I powers other than the Bankruptcy Power? The Supreme Court addressed this question in several subsequent cases.

a. In *Allen v. Cooper*, 140 S. Ct. 994 (2020), plaintiff Allen sued the state of North Carolina and its Governor, Roy Cooper, for copyright infringement. The federal Copyright Remedy Clarification Act (CRCA) purports to abrogate state sovereign immunity from copyright suits. Relying on *Katz*, Allen argued that Congress's power to authorize suits against states must be evaluated separately for each power of Congress. He argued that Congress's power under the Intellectual Property Clause of Article I included the power of abrogation.

The Supreme Court, however, said that "everything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism." The Court said that *Katz* did not invite "clause-by-clause" reexamination of Congress's Article I powers, but rather was a "good-for-one-clause-only holding."

Allen therefore reverted to the usual, pre-*Katz* analysis and invalidated the CRCA. The Court considered whether the CRCA could be an exercise of Congress's powers under § 5 of the 14th Amendment, but 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.)

b. But in *PennEast Pipeline Co. LLC v. New Jersey*, 141 S. Ct. 2244 (2021), the Supreme Court approved a private action against a state under the Natural Gas Act. That Act empowers the Federal Energy Regulatory Commission (FERC) to authorize a private party to build a pipeline to carry natural gas. The Act also provides that a private party who has received such authorization may sue property owners (including states) to obtain rights of way necessary to the building of the pipeline.

Pursuant to the Act, FERC authorized PennEast to build a pipeline, and PennEast sued numerous property owners, including the state of New Jersey, in federal district court to obtain rights of way. New Jersey sought to dismiss on the ground of sovereign immunity, but the Supreme Court held that the suit could go forward.

In an opinion by Chief Justice Roberts, the Court acknowledged that Congress may not use its Article I powers to abrogate state sovereign immunity from suit, but it also noted that states may *consent* to suit, and that such consent may have occurred "in the plan of the Convention," i.e., when the states ratified the Constitution. In cases covered by such consent, no congressional abrogation of state sovereign immunity is needed.

By ratifying the Constitution, the Court held, the states consented "to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates." Although it did not specify which constitutional provision grants the federal government the power of eminent domain, the Court noted that it had long held that the federal government has that power, that it may use the power to acquire property owned by states, and that it may delegate the exercise of the power to private parties.

The federal government's eminent domain power, the Court noted, is "complete in itself," that is, action by a state can neither enlarge nor diminish it. Moreover, the Court held, the eminent domain power is inextricably intertwined with the power to bring a condemnation action: "[A]uthorization to take property interests impl[ies] a means through which those interests can be peaceably transferred." Accordingly, the Court held, by ratifying the Constitution, the states had consented to suits by private parties exercising the federal power of eminent domain. Four Justices dissented.

c. Subsequently, in TORRES v. TEXAS DEP'T OF PUBLIC SAFETY, 142 S. Ct. 2455 (2022), the Court considered a claim against a state under the Uniformed Service Employment and Reemployment Rights Act (USERRA). USERRA provides that a person who leaves a job to serve in the U.S. armed forces is entitled to reemployment in the former job upon completion of military service, and it also requires the person's former employer to make reasonable accommodation for any service-related disability. USERRA applies even when the person's former employer is a state.

Plaintiff Torres, a Texas state trooper who also served in the U.S. Army Reserves, was called to active U.S. Army duty and later honorably discharged. He asked Texas to reemploy him in accordance with USERRA. Although he was unable to return to his previous job as a state trooper because of a medical condition he acquired while on active Army duty, he requested that Texas reemploy him in a different position as an accommodation. When Texas refused, he sued it in Texas state court under USERRA. Texas moved to dismiss on the basis of sovereign immunity, but the Supreme Court, in an opinion by Justice Breyer, held that the suit could proceed. The Court again relied on the theory that a waiver of sovereign immunity may have occurred when the states ratified the Constitution, which it referred to as a "structural waiver." The Court said:

> *PennEast* defined the test for structural waiver as whether the federal power at issue is "complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention." . . . Where that is so, the States implicitly agreed that their sovereignty "would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon

> it by the Constitution.'" . . . By committing not to "thwart" or frustrate federal policy, the States accepted upon ratification that their "consent," including to suit, could "never be a condition precedent to" Congress' chosen exercise of its authority. . . . The States simply "have no immunity left to waive or abrogate." . . .
>
> Congress' power to build and maintain the Armed Forces fits *PennEast's* test. The Constitution's text, its history, and this Court's precedents show that "when the States entered the federal system, they renounced their right" to interfere with national policy in this area.

The Court observed that federal power over the armed forces derives from several "broad, interrelated provisions" of the Constitution that "strongly suggest[] a complete delegation of authority to the Federal Government." These provisions include the Preamble, which specifies that a purpose of the Constitution is to "provide for the common defence"; several powers granted to Congress by Article I, § 8, cls. 11-16 (the powers to "declare War," "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval Forces," "provide for calling forth the Militia," and "provide for organizing, arming, and disciplining, the Militia"); Article II's provision making the President the "Commander in Chief" of the Army, Navy, and Militia; and also the provisions of Article I, § 10, which prohibit the states from exercising war powers (e.g., states may not "engage in War, unless actually invaded"). The Constitution's grant of sweeping military power to the federal government and its limitations on state military authority "provide strong evidence that the structure of the Constitution prevents States from frustrating national objectives in this field."

The Court also observed that experience under the Articles of Confederation, which did not empower Congress to raise troops directly but required it to "requisition" troops from the states, had shown the "utter inadequacy" of that system. The Constitution was designed to provide "an entire change in the first principles of the system" and to allow Congress to raise armies whether or not states consented: "The National government['s] . . . power 'to raise and support armies' cannot be 'question[ed by] any State authority.' "

Accordingly, the Court held:

> Congress' power to build and maintain a national military is "complete in itself." *PennEast* . . . . [T]he States agreed that their sovereignty would "yield . . . so far as is necessary" to national policy to raise and maintain the military. . . . And because States committed themselves not to "thwart" the exercise of this federal power, "[t]he consent of a State," including to suit, "can never be a condition precedent to [Congress'] enjoyment" of it. . . . We consequently hold that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power "[t]o raise and support Armies" and "provide and maintain a Navy."

Justice Thomas, dissenting for himself and for Justices Alito, Gorsuch, and Barrett, argued that *PennEast* had permitted suit against states under the federal eminent domain power not merely because that power was "complete in itself," but because it was "inextricably intertwined" with judicial condemnation proceedings, such that denying Congress the power to authorize private eminent domain suits against states "would be tantamount to depriving the Government of part of the eminent domain power itself." The test for whether Congress can

authorize suit against states pursuant to a federal power cannot, Justice Thomas argued, be simply whether the power is "complete in itself," because the Court had historically held that *every* power of Congress meets that test. *E.g. Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (stating that the commerce power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution"). Unless limited by something like the "inextricably intertwined" requirement, Justice Thomas said, the Court's "complete in itself" test would have "the certainty and objectivity of a Rorschach test," would fail to distinguish the military powers from other Article I powers such as the commerce power, and would "provide future courts cover to further erode the States' sovereign immunity."

d. Insofar as their relation to state sovereign immunity is concerned, should Congress's Article I powers be considered as a group, or should each be considered separately? Does it make sense to say that Congress may not use its Article I powers to *abrogate* state sovereign immunity, *see Seminole Tribe*, but that as to some of those powers abrogation is unnecessary because the states *consented* to suit in connection with those powers when they ratified the Constitution?

e. How do you understand the new "structural waiver" test? Consider the powers granted to Congress by Article I, § 8 of the Constitution. Other than the military powers, which of them, if any, is the subject of a structural waiver such that the states, by ratifying the Constitution, consented to suit under statutes based on that power? Is it safe to say that the commerce power is *not* the subject of such a structural waiver? How about the intellectual property power?

f. The Court noted in *Torres* that the framers of the Constitution desired to create a system in which the federal government was not dependent on the states in military matters, and in which the states could not interfere with federal military authority. That assertion is quite plausible, and presumably USERRA helps promote military recruitment by providing assurance to those who give up a job in order to join the military that their job will be waiting for them when they complete their military service. But how much interference with federal military authority would actually result if Congress could not subject states to suit under statutes such as USERRA? How much worse would military recruitment likely be? In answering this question, consider what remedies former state employees could pursue under USERRA even if state sovereign immunity applied to USERRA suits.

G. Suits Against States in State Courts

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."

Updates to Chapter 8

A. Causes of Action

1. Against Federal Officers

Add as new notes on p. 731:

5. 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).

6. In EGBERT v. BOULE, 142 S. Ct. 1793 (2022), the Court restricted *Bivens* even further. Plaintiff Boule lived in Washington state, on property abutting the U.S.-Canada border, and operated his home as a bed-and-breakfast inn. The area surrounding his property was the site of frequent cross-border smuggling of people and drugs. Defendant Egbert, a Border Patrol agent, arrived at Boule's property to investigate the immigration status of one of Boule's guests. Boule asked Egbert to leave the property, but Egbert allegedly picked Boule up and threw him against an SUV and then onto the ground. Egbert then checked the guest's immigration paperwork,

found it to be in order, and left. When Boule filed a grievance against Egbert with the Border Patrol, the Border Patrol investigated Egbert but took no action against him.

Boule sued Egbert for alleged violation of Boule's Fourth Amendment rights. In an opinion by Justice Thomas, the Court held that the claim could not proceed. In several ways, the Court's opinion narrowed *Bivens* even more than *Ziglar* already had:

● The Court reiterated that a court considering a *Bivens* claim should proceed in two steps, the first of which is to ask whether the case presents a new *Bivens* context. But in articulating the second step, the Court used language even more stringent than it had previously. The Court said that if a case presents a new *Bivens* context, a court should decline to create a *Bivens* remedy if "there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed" (internal quotation omitted). The Court emphasized that "[i]f there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy" (internal quotation omitted). The Court said that the two steps of the test "often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." And the Court said, "[a] court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damages action to proceed" (internal quotation omitted).

● In applying the foregoing test, the Court said that its reasoning in *Hernandez* (see note 5 above), in which it held that it could not recognize a *Bivens* action because "regulating the conduct of agents at the border unquestionably has national security implications," applied "with full force," notwithstanding that the case differed from *Hernandez* in that plaintiff Boule was a U.S. citizen and defendant Egbert's allegedly wrongful conduct took place entirely on the U.S. side of the border. The Court said that "a court should not inquire . . . whether *Bivens* relief is appropriate in light of the balance of circumstances in the particular case . . . [but should rather] ask [m]ore broadly if there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate" (internal quotations omitted). The Court said that its task was to ask "whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally." It concluded that "the Judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate."

● The Court also determined that Boule's *Bivens* claim was barred for a second, independent reason. In *Ziglar*, the Court had said that Congress's provision of an alternative remedial structure "may" limit the power of the judiciary to infer a *Bivens* cause of action. Here, the Court said that "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure" (internal quotation omitted). Applying this point, the Court said that Boule's Fourth Amendment claim was barred by the availability of the Border Patrol's grievance procedure, even though Boule, after initiating that procedure, had no right to participate in it and could not seek judicial review of an unfavorable result (and also, although the Court did not expressly acknowledge it, even though a damages award was not a possible outcome of the procedure). The Court explained that:

> *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers"—*i.e.*, the focus is whether the Government has put in place safeguards to "preven[t]" constitutional violations "from recurring." . . . [T]he question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts. So long as Congress or the Executive has

> created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy.

Justice Gorsuch, in an opinion concurring in the judgment, said, "Candidly, I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself." He added:

> [T]he Court's real messages run deeper than its case-specific analysis. If the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could. And if the only question is whether a court is "better equipped" than Congress to weigh the value of a new cause of action, surely the right answer will always be no. Doubtless, these are the lessons the Court seeks to convey.

In a dissenting opinion joined by Justice Breyer and Justice Kagan, Justice Sotomayor argued that Boule's case did not involve any new context; like *Bivens*, it "involved a U. S. citizen bringing a Fourth Amendment claim against individual, rank-and-file federal law enforcement officers who allegedly violated his constitutional rights within the United States by entering his property without a warrant and using excessive force." That defendant Egbert worked for the Border Patrol rather than the Bureau of Narcotics (which employed the defendants in *Bivens*) was, Justice Sotomayor said, a "trivial" difference that did not create a new context. Moreover, even if the context were regarded as new, Justice Sotomayor argued that there were no "special factors" warranting denial of a *Bivens* remedy. She said that the case was unlike *Hernandez* in that it presented no "international incident," would not affect diplomatic relations, and did not have a strong connection with international security. Nor was it a case like *Ziglar*, in which the plaintiffs' claims challenged general, high-level executive policies; rather, it involved only a "run-of-the-mill inquiry."

With regard to the Court's holding that the Border Patrol's administrative grievance procedure precluded a *Bivens* remedy, Justice Sotomayor said that the administrative procedure was "no remedy whatsoever," inasmuch as the plaintiff had no right to participate in the grievance procedures and could not seek judicial review of their result. She also noted that the Court had not previously held that remedies "providing no relief to the individual whose constitutional rights have been violated" could foreclose a *Bivens* remedy.

What does *Egbert* portend for the future availability of *Bivens* remedies? Is Justice Gorsuch correct that by denying a remedy in a case so closely analogous to *Bivens* itself, the Court is signaling that the *Bivens* remedy should never be extended to any new context, no matter how trivially distinct the context is from that of *Bivens*? In what kinds of cases (if any) is a *Bivens* remedy still available today?

2. Against State Officers

b. Wrongs Covered by § 1983

Add as a footnote at the end of the first paragraph on p. 759:

Another case that highlights the importance to a § 1983 action of determining whether a constitutional violation has occurred at all is *Vega v. Tekoh*, 142 S. Ct. 2095 (2022). In that case, the plaintiff alleged that the defendant, a police officer, violated his constitutional rights by questioning him in connection with a criminal investigation without giving him the "*Miranda* warnings" ("you have the right to remain silent," etc.) required by *Miranda v. Arizona*, 384 U. S. 436 (1966). The Supreme Court, however, noted that *Miranda* and subsequent decisions had characterized *Miranda*'s requirements as "prophylactic rules" designed to safeguard the constitutional right against compelled self-incrimination, not as constitutional rights in themselves. A violation of *Miranda* is, therefore, not necessarily a violation of the Constitution, and if it is not, it does not give rise to a § 1983 action. Three Justices dissented.

Add a new note on p. 759:

c. Another limitation on the scope of constitutional rights enforceable via § 1983 stems from the interaction between § 1983 and the writ of habeas corpus. Read literally, § 1983's authorization of suit for "deprivation of any rights . . . secured by the Constitution" would permit suits by state prisoners who are serving sentences following conviction of crimes and who claim that their state criminal trials violated their constitutional rights. Such prisoners, however, may seek the remedy of habeas corpus under 28 U.S.C. § 2254 (covered in detail in Chapter 11). If they could bring the same claims under § 1983, then they could evade some important restrictions on the habeas remedy, such as the requirement that a state prisoner exhaust available state remedies before seeking federal habeas relief. *See* 28 U.S.C. § 2254(b). (Recall that the Supreme Court held in *Patsy*, note 5 following *Monroe v. Pape*, *supra*, that § 1983 does not require such exhaustion.) Therefore, the Supreme Court has held that § 1983 contains an "implicit exception . . . for actions that lie within the core of habeas corpus." *Wilkinson v. Dotson*, 544 U. S. 74, 79 (2005) (internal quotation omitted).

This exception bars state prisoners from using § 1983 to challenge the validity of their conviction and/or sentence. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). It also bars any § 1983 suit that seeks to advance the plaintiff's release from prison even if the suit does not challenge the plaintiff's conviction. *E.g.*, *id*. (holding that a state prisoner may not use § 1983 to challenge the allegedly unconstitutional cancellation of the prisoner's "good time" credits). It even bars a § 1983 suit for damages only, if establishing the basis of the damages claim would necessarily imply the invalidity of the plaintiff's conviction (unless that conviction was subsequently invalidated by state action or was the subject of federal habeas relief). *Heck v. Humphrey*, 512 U.S. 477 (1994).

The exception does not, however, bar every § 1983 action by a state prisoner. Section 1983 may, for example, be used to claim that the *conditions* of a prisoner's confinement are unconstitutional, *Preiser*, *supra*, and a prisoner subject to a death sentence may use § 1983 to challenge the constitutionality of the state's planned *method* of execution, provided the suit would not prevent the state from executing the prisoner at all. *E.g.*, *Nance v. Ward*, 142 S. Ct. 2214 (2022).

Add at the end of the last paragraph on p. 789:

Still, assertions of qualified immunity are not always successful. For example, in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), summary judgment based on qualified immunity had been granted

against a plaintiff who claimed that the defendant correctional officers had violated his Eighth Amendment rights by confining him for six days in "shockingly unsanitary" prison cells, including one "teeming with human waste." The Supreme Court reversed. It held that under the "extreme circumstances" asserted, "no reasonable correctional officer could have concluded that . . . it was constitutionally permissible to house [the plaintiff] in such deplorably unsanitary conditions for such an extended period of time."

Updates to Chapter 9

B. *Pullman* Abstention

Add to note 7 on p. 820:

In *McKesson v. Doe*, 141 S. Ct. 48 (2020), a diversity case, the plaintiff asserted a novel tort theory under Louisiana state law and the defendant argued that state law would not recognize the asserted tort and also that awarding tort damages would violate the First Amendment. The Supreme Court said that certification "is by no means obligatory merely because state law is unsettled; the choice instead rests in the sound discretion of the federal court." But the Court ordered certification of the question of whether state law would recognize the asserted tort, even though the district court had chosen not to certify. The Court said that certification was "advisable" because "the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts" and because "certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical." Under what circumstances, therefore, should the decision whether to certify be left to the district court's discretion, and in what circumstances may an appellate court order certification because it is "advisable"?

D. *Younger* Abstention

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

C. The Scope of Supreme Court Review of Cases Decided by State Courts

3. The Final Judgment Requirement

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

1. The Basic Principle of Habeas Corpus for a Criminally Convicted Prisoner

Add new notes on p. 987:

5. *Brown v. Allen* holds that a prisoner in custody pursuant to a criminal conviction whose constitutional rights were violated at trial is "in custody in violation of the Constitution" within the meaning of § 2254(a) of the habeas statute and is therefore eligible for habeas relief. *See*, *e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 485-86 (1973). However, as the rest of this chapter shows, starting in the 1970s, the Supreme Court subjected habeas to increasingly stringent restrictions, partly through judicial doctrines and partly through interpretation of the habeas statute, particularly following the statute's 1996 AEDPA amendments.

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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).

The Court's recent cases have emphasized that "criminal law enforcement [is] primarily a responsibility of the States"; that habeas "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority"; and that habeas is an "extraordinary remedy" that guards only against "extreme malfunctions in the state criminal justice systems." *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022) (internal quotations and citations omitted). The Court has also indicated that even where a prisoner meets all requirements for habeas, the prisoner is never *entitled* to that relief; the prisoner must still "persuade a federal habeas court that law and justice require [it]." *Id*. (quoting *Brown v. Davenport*, 142 S. Ct. 1510 (2022)).

6. One purported justification for this increasing stringency is the assertion (briefly mentioned by Justice Jackson in his concurring opinion in *Brown v. Allen*) that historically, habeas was not available to prisoners who were in custody by virtue of a criminal sentence issued by a court of competent jurisdiction. According to this argument, in cases brought by prisoners serving criminal sentences, traditional habeas practice did not allow the court from which habeas relief was requested (the "habeas court") to look behind a judgment of conviction issued by the court that had sentenced the prisoner (the "sentencing court") to see whether it was infected by error, such as a violation of the prisoner's constitutional rights. The habeas court could grant relief only if the sentencing court lacked jurisdiction. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1567 (Gorsuch, J., concurring).

The Supreme Court revived this argument in *Brown v. Davenport*, 142 S. Ct. 1510 (2022). Relying on 18th- and 19th-century cases, the Court, in an opinion by Justice Gorsuch, said that under the "traditional understanding" of habeas, a federal habeas court could examine "only the power and authority of the [sentencing] court to act, not the correctness of its conclusions."

Justice Kagan challenged this assertion in a dissenting opinion. She argued that 19th-century federal courts permitted prisoners serving criminal sentences to challenge their sentences on constitutional grounds. Although some such cases did say that a habeas court could grant relief to such a prisoner only if the sentencing court lacked "jurisdiction," the cases used the word "jurisdiction" to mean "something different from what it does today." Constitutional defects in a sentencing court's proceedings were deemed to deprive the sentencing court of jurisdiction, even though today the same defects would be regarded as nonjurisdictional. For example, if the trial proceedings violated the defendant's right to trial by jury, the trial court was said to lack "jurisdiction" to try the defendant, making habeas relief appropriate. Justice Kagan argued that statements that habeas could issue only for "jurisdictional" defects must be understood in this historical context, in which the broad understanding of which defects were "jurisdictional" allowed habeas courts to grant "expansive relief."

What is the relevance of this historical debate? Taken to its logical conclusion, the Court's historical argument would require a federal habeas court to give preclusive effect to the decisions of the sentencing court, provided the sentencing court had jurisdiction, which would essentially eliminate the availability of habeas relief. The Court did not go this far in *Brown v. Davenport*, but said that its doctrines were "aimed at returning the Great Writ closer to its historic office."

Should federal courts simply give preclusive effect to the final judgment of a sentencing court (provided that court had jurisdiction)? Or should a federal habeas court (as is currently permitted) be allowed to reconsider points already considered by the sentencing court? And if the latter, what is the point of asserting (perhaps incorrectly) that the traditional understanding of habeas required a habeas court to give preclusive effect to a sentence issued by a court of competent jurisdiction?

2. Prerequisites to Habeas Corpus

Add as a footnote at the end of the second paragraph under heading "a" on p. 987:

However, if a prisoner's sentence has completely expired, the prisoner cannot use habeas to attack the conviction underlying it even if that conviction later becomes a necessary predicate for conviction of another crime, and the prisoner is in custody for that other crime. For example, if a prisoner is convicted of a sex crime in state court and completely serves his sentence, he cannot attack that conviction via habeas even he is later convicted of (and is in custody for) the crime of failing to register as a sex offender. *Alaska v. Wright*, 141 S. Ct. 1467 (2021).

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).

Replace note 4, p. 1022, with:

4. Note the two exceptions to the principle of *Teague*. The first exception, for new substantive rules (i.e., new rules that prohibit the criminalization of the conduct for which the defendant was convicted), is clear. But what about the second exception? What would constitute a "watershed," accuracy-related, procedural rule that would apply retroactively on habeas? The Court's cases applying this exception never found any rule to fall within it. For example, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court declined to give retroactive, collateral application to the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that the Constitution does not permit a state court, based on facts found only by a judge, to "enhance" a defendant's sentence beyond the statutory maximum sentence for the offense of which a jury found the defendant guilty. Even though a dissenting opinion in *Apprendi* had described the case as "a watershed change," the Court in *Schriro* determined that the rule of *Apprendi* was not "accuracy-related," as there was insufficient evidence to believe that juries are more accurate factfinders than judges.

After rejecting attempts to invoke the second *Teague* exception for over 30 years, the Court finally abolished the exception altogether in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). *Edwards* involved the Court's prior decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which held that the jury verdict convicting a defendant of a serious offense in a state criminal trial must be unanimous. *Ramos* overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972), which

approved state procedures permitting a jury in a criminal case to convict a defendant by a nonunanimous vote.

In *Edwards*, the Court, speaking through Justice Kavanaugh, applied the *Teague* test to determine that the rule of *Ramos* would not apply retroactively in habeas cases, primarily on the ground that the rule of *Ramos* was no more momentous that other rules to which the Court had previously declined to give retroactive application in habeas, under either the *Teague* test or under the prior, more generous *Linkletter* test. The Court then said:

> [T]he Court's many retroactivity precedents taken together raise a legitimate question: If landmark and historic criminal procedure decisions—including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*[*]—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts. . . . [F]or decades, the Court has rejected watershed status for new procedural rule after new procedural rule, amply demonstrating that the purported exception has become an empty promise.
>
> Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. . . . It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must "be regarded as retaining no vitality."

Justice Thomas, joined by Justice Gorsuch, concurred but said that the Court might also have reached the same result by applying § 2254(d) of the habeas statute. Justice Gorsuch, joined by Justice Thomas, also concurred but, after reviewing the history of habeas, reached an even starker conclusion, namely, that "[t]he writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent of jurisdiction once it has become final." Justice Kagan, joined by Justice Breyer and Justice Sotomayor, dissented.

4. The Standard of Review in Habeas Proceedings

Add as a footnote to the end of the first paragraph of note 7 on p. 1042:

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[*] [The Court was referencing the following decisions, noted earlier in its opinion: *Mapp v. Ohio*, 367 U. S. 643 (1961) (applying the Fourth Amendment's exclusionary rule to the states); *Miranda v. Arizona*, 384 U. S. 436 (1966) (requiring police to advise suspects of their rights before conducting a custodial interrogation); *Duncan v. Louisiana*, 391 U. S. 145 (1968) (applying the Sixth Amendment right to a jury trial to defendants in state criminal cases); *Crawford v. Washington*, 541 U. S. 36 (2004) (holding that the Sixth Amendment's Confrontation Clause limits the use of hearsay evidence in state criminal cases); *Batson v. Kentucky*, 476 U. S. 79 (1986) (prohibiting the prosecutor in a state criminal case from exercising peremptory challenges on the basis of race). The Court had previously determined that none of these procedural rules apply retroactively in habeas cases. –Ed.]

The evidence that a federal habeas court may consider includes evidence that was presented to state courts in post-trial proceedings, such as evidence presented in a state habeas proceeding. *Cullen*, 563 U.S. at 188 & n.12. But in *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022), the Supreme Court reiterated that a federal habeas court usually may not consider new evidence, beyond what a state prisoner presented at trial or in state post-trial proceedings. *Shinn* held that this bar applies even if the reason that the prisoner did not present evidence in state court was that the prisoner's post-trial counsel was constitutionally ineffective.

Moreover, in *Shoop v. Twyford*, 142 S. Ct. 2037 (2022), the Court held that a federal district court may not order the gathering of evidence for possible use in a habeas proceeding (such as by ordering that a prisoner be transported for medical testing) unless § 2254(e) of the habeas statute would allow the district court to consider the evidence.

5. Claims Defaulted in State-Court Proceedings

Add as a footnote at the end of note c on pp. 1058-1059:

The ineffectiveness of *collateral post-conviction* counsel (e.g., counsel assisting a prisoner with a state habeas petition) does not usually excuse any procedural defaults. This distinction arises because a defendant has a constitutional right to counsel at trial and on direct appeal (and, therefore, a right to counsel who is not constitutionally ineffective), but the Supreme Court has never held that a convicted defendant has a constitutional right to counsel in any collateral, post-conviction proceedings.

The Supreme Court has created a "narrow exception" to the foregoing principle: the ineffective assistance of collateral post-conviction counsel can excuse a prisoner's failure to raise a claim that the prisoner's trial counsel was ineffective, if it occurred in a proceeding that was the prisoner's first opportunity to raise that claim because state rules, either formally or as a practical matter, made it impossible to raise the claim on direct appeal of the prisoner's conviction. *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013).

But in *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022), the Supreme Court held that even though the ineffective assistance of post-conviction counsel may excuse the prisoner's failure to raise the claim that the prisoner's trial counsel was ineffective, it does not excuse the prisoner's failure to *develop the record* with respect to that claim. Accordingly, a prisoner who did not develop the needed record on the claim of ineffective assistance of trial counsel, because of the ineffective assistance of post-conviction counsel, "failed" to develop the record within the meaning of 28 U.S.C. § 2254(e)(2), *see (Michael) Williams v. Taylor*, p. 1029 (main volume), and in such a case a federal habeas court may not hold an evidentiary hearing to receive new evidence, unless the case falls within § 2254(e)(2)'s extremely narrow exceptions.

The Court explained that the reason why the ineffective assistance of post-conviction counsel may excuse failure to raise the claim of ineffective assistance of trial counsel, but not the failure to develop the record on that very claim, is that the procedural default rules of *Wainwright v. Sykes* and its progeny are judicial creations to which courts may appropriately make exceptions, but the rule of § 2254(e)(2) is statutory and the courts have no power to create exceptions to it. Three Justices dissented, arguing that because in such a case the errors of ineffective post-conviction counsel cannot fairly be attributed to the prisoner, the prisoner has not "failed" to develop the record.

Strike footnote 1 on p. 1060 and instead append the following to note b on that page:

If the state courts themselves conducted a harmlessness inquiry and determined that a constitutional error that occurred at the prisoner's trial was harmless, then § 2254(d) of the habeas statute (as interpreted by the Supreme Court in (*Terry) Williams v. Taylor*, p. 1031, main volume) applies to that determination, which means that a federal court can grant habeas relief only if determines that the state court determination of harmlessness was not merely wrong, but was either "contrary to" or "involved an unreasonable application of" clearly established federal law. Accordingly, the Supreme Court held in *Brown v. Davenport*, 142 S. Ct. 1510 (2022), in such a case, a federal court can grant habeas relief only if it determines that the trial court error was in fact prejudicial under the standards of *Brecht* and *O'Neal*, stated above, *and* that no reasonable jurist could have found that the error was harmless.

Is it really necessary to apply both tests? Could there be a case in which the federal court determines that a constitutional error that occurred at the original trial actually prejudiced the defendant, *see Brecht*, or that the court is in "virtual equipoise" as to whether the error was prejudicial or not*, see O'Neal*, and yet the court also determines that a reasonable jurist might find *beyond a reasonable doubt* that the error was harmless? Justice Kagan, dissenting in *Brown v. Davenport*, thought not. She said that requiring federal courts to apply both tests would merely compel them to "spin their wheels." 142 S. Ct. at 1538 (Kagan, J., dissenting).

Part II: THE CONSTITUTION AND SELECTED FEDERAL STATUTES

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 chuse 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 chusing 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 encreased 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 faithfully executed, and shall Commission all the Officers of the United States.

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

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good 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.

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)

(1) 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)

(1) 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 . .

(1) 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)

(1) 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)

(i) 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.

(2) 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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